Supreme Court, U.S.
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No. 05 1518

In The

Supreme Court of the United States

WASCO PRODUCTS, INC.,

Petitioner,

v.

SOUTHWALL TECHNOLOGIES, INC.
AND BOSTIK-FINDLEY, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to *Gomez v. Toledo*, 446 U.S. 635 (1980), a plaintiff must plead facts tolling the running of statute of limitations defense where the time bar does not appear on the face of the complaint and there are no other relevant pleading requirements.

PARTIES TO THE PROCEEDINGS

Petitioner is Wasco Products, Inc.

Respondents are Southwall Technologies, Inc. and Bostik-Findley, Inc.

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PETITION FOR WRIT OF CERTIORARI

Wasco Products, Inc. respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *Wasco v. Southwall Technologies*, 435 F. 3d 989 (9th Cir. 2006). It is reproduced in the Appendix at App. 1. The Court of Appeals Memorandum Opinion is reproduced in the Appendix at App. 9. The Opinion of the District Court granting Respondents' Motions for Summary Judgment is unreported and is reproduced in the Appendix at App. 13.

JURISDICTION

The Court of Appeals Judgment was entered on January 13, 2006. A timely Petition for Rehearing was denied on February 27, 2006, and is reproduced in the Appendix at App. 40. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. Section 2072, Federal Rules of Civil Procedure Rules 8 and 9.

STATEMENT

Petitioner seeks review of the ruling of the Ninth Circuit Court of Appeals, which held that plaintiffs such as Wasco must plead facts supporting the tolling of a statute of limitations defense even when the time bar does not appear on the face of the complaint.

Petitioner seeks review of the Ninth Circuit's ruling because it is in conflict with the rulings of this Court, including *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920 (1980). It is also in conflict with the rulings of the Ninth Circuit. *See U.S. v. McGee*, 993 F. 2d 184 (9th Cir. 1993). It is also in conflict with the rulings of several other circuits. *See also Tregenza v. Great American Communications Co.*, 12 F. 3d 717 (7th Cir. 1993).

The petition concerns an action for injuries and for restitution arising from Respondents' violations of the California Unfair Competition Law and False Advertising Act (California Business and Professions Code Sections 17200, *et seq.* and 17500, *et seq.*) which prohibit acts of unfair competition, including misleading advertising. (Although the Decision does not identify the claims to which the analysis is applied, it is clear that the issue is the District Court's decision as it relates to Wasco's Unfair Competition Law claims (the fifth, sixth and seventh claims of the Third Amended Complaint.) App. 27-30, 35-37, 87-92.

Respondents designed the "Heat Mirror" window and the sealant component utilized in the manufacture of the window. As a result of Respondents' "unfair practices," incorrect and misleading representations regarding the performance regarding the Heat Mirror window product and the durability of the sealant used, Petitioner purchased

the windows and incorporated them into its skylights for resale. Petitioner continued to purchase the windows until after the Complaint was filed.

The "unfair practices" do not have to be fraudulent nor does the conspiracy have to be fraudulent – it must merely be an agreement to commit wrongful acts. To state an Unfair Competition Law claim, Wasco is only required to demonstrate that the Respondents received property (money) from the sales of the defective Heat Mirror technology (including the Bostik sealant) through unfair and misleading acts. *See, e.g., People v. Beaumont Investment Ltd.*, 111 Cal. App. 4th 102, 3 Cal. Rptr. 3d 429 (2003) where the court found a "conspiracy" where the defendants simply agreed to execute housing rental agreements which violated a local municipal code and to jointly accept payments pursuant thereto for a period of 13 years, 14,124 separate statutory violations arising from two different patterns of conduct: The first being the actions to obtain the unlawful long term leases (154 violations); and the second, each receipt of rent pursuant to the unlawful conduct – the leases (6,985 payments) doubled because each payment violated both Sections 17200 and 17500. *Id.*, 111 Cal. App. 4th at 128-130, 3 Cal. Rptr. 3d at 449-452.

Wasco's Complaint did not contain a pleaded claim of "conspiracy" because conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasers a common plan or design in its perpetration. *Beaumont Investment Ltd.*, 111 Cal. App. 4th at p. 136, 3 Cal. Rptr. 3d at 455. Importantly, the effect of a conspiracy is to toll the statutes of limitations until the last act of the parties – here receipt of money

from the sale of Heat Mirror purchases made by Wasco. *Id.*, 111 Cal. App. 4th at p. 137, 3 Cal. Rptr. 3d at 457.

In the Decision, the Panel announced a new pleading rule which is contrary to the decisions of the United States Supreme Court, the Ninth Circuit Court of Appeals, other circuit courts, the Federal Rules of Civil Procedure, as well as the laws of the State of California. The Panel's Decision required a plaintiff to plead the legal theory of civil conspiracy in anticipation of respondents' affirmative defense of the statute of limitations even though that defense does not appear on the face of the complaint.

Contrary to the pleadings and the wording of the California Unfair Competition Law which prohibit unfair and misleading competition, the Panel found (without citation) the object of the Respondents' conspiracy was "fraudulent." App. 4. The Panel then observed that there is no "principled distinction" between pleading affirmative claims of conspiracy to commit fraud and the assertion of conspiratorial conduct in response to an affirmative defense asserted in an Answer. App. 6. From this, the Court found an affirmative duty to plead such fraudulent conspiracy in anticipation of an affirmative defense. App. 6. The Panel's decision is contrary to this Court's Decision in *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 1924 (1980) and other authorities.

REASONS FOR GRANTING OF THE PETITION

A. The Panel's Decision Requiring A Plaintiff To Plead Facts Or Theories In Anticipation Of An Affirmative Defense Such As The Statute Of Limitations Where The Defense Does Not Appear On The Face Of The Complaint Conflicts With Supreme Court And Ninth Circuit Precedent.

The Panel Decision recognizes that, in its opposition to summary judgment, Wasco alleged for the first time that Bostik and Southwall were engaged in a civil conspiracy to misrepresent the quality of the Heat Mirror IGUs in an attempt to toll the statute of limitations. App. 3. Both Respondents contend that because Wasco failed to set forth the alleged conspiracy in its complaint, it may not raise the issue to toll the statute of limitations. App. 3. The Panel agreed:

> Although the civil conspiracy is not an element of Wasco's claims, federal courts have repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their pleading; this rule applies even where the tolling argument is raised in opposition to summary judgment.

App. 5.

The Panel then incorrectly concluded: "Our court does not appear to have addressed this issue previously." App. 4. As is set forth below, this Court and the Ninth Circuit have both addressed the issue and held to the contrary.

In *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 1924 (1980), the plaintiff sought redress for violations of 42 U.S.C. Section 1983. This Court addressed whether the

plaintiff was required to plead that "official immunity for acting under a claim of good faith" did not apply and that the official was acting in bad faith or without color of immunity. After noting that nothing in the statute required an allegation of "bad faith," the Court explained:

> Since qualified immunity is a defense, the burden of pleading it rests with the defendant. *See* Fed. Rule Civ. Proc. 8(c) (defendant must plead any 'matter constituting an avoidance or affirmative defense'); 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1971 (1969) . . . we see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith.

Id. 446 U.S. at 640, 100 S. Ct. at 1924.

> There may be no way for a plaintiff to know in advance whether the official has such a belief or indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot be reasonably expected to know . . . To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law. [Citations omitted.]

Id. 446 U.S. at 641, 100 S. Ct. at 1924.

There is no distinction between the Court's analysis in *Gomez* and the Panel's Decision here. The Panel has simply announced a new onerous pleading requirement for the Ninth Circuit. There is but one set of Federal Rules of Civil Procedure. Pleading requirements must be uniform for obvious reasons. They cannot vary from circuit to circuit, district to district.

The Ninth Circuit has historically agreed with the instruction of *Gomez*. In *U.S. v. McGee*, 993 F. 2d 184 (9th Cir. 1993), the defendant claimed the enforcement action was untimely. While allowing the government plaintiff to amend a pleading the court recognized:

> Moreover, the running of the statute of limitations is an affirmative defense that must be pleaded and proved by a taxpayer. *See* Fed. R. Civ. P. 8(c); *United States v. Gurley*, 415 F. 2d 144, 147 (9th Cir. 1969). The government is not required to plead on the subject of an anticipated affirmative defense.

Id. at 187.

In contrast, Petitioner notes that the authorities relied upon to support the Panel's opinion all appear in the context of pleadings where the statute of limitations defense appears on the face of the complaint or where the affirmative claim was required to be pleaded with specificity. *See, e.g., Guerrero v. Gates*, 357 F. 3d 911 (9th Cir. 2004) plaintiff's 42 U.S.C. Section 1983 claim accrued in 1997 was barred on its face when he filed on June 30, 2000; *389 Orange Street Partners v. Arnold*, 179 F. 3d 656 (9th Cir. 1999) where the court applied Connecticut General Statutes requiring a party challenging a statute of limitations defense to affirmatively plead it and where the documents were executed in June, 1993 and the complaint was not filed until August of 1996 – more than three years later and after the claims were barred; *Kirkdoll v. City of Topeka*, 315 F. 3d 1234, 1234 (10th Cir. 2003) plaintiff failed honor detailed pleading requirements for suing a governmental entity; *Bull S.A. v. Comer*, 55 F. 3d 678 (D.C. Cir. 1995) analyzing a trademark registration issue where the re-registration was barred on the face of

the re-registration; *Larson v. Northrop Corp.*, 21 F. 3d 1164 (D.C. Cir. 1994) where the ERISA claim was barred on the face of the complaint.

Here, Petitioner's claims are not barred on the face of the Complaint. (The Panel Decision does not claim any of the original claims are.) They are merely unfair business practices claims of misleading advertising and marketing; they do not rise to the level of fraud claims. They do not require pleading with specificity pursuant to F.R.C.P. 9(b).

Clearly, pursuant to *Gomez v. Toledo*, *supra*, and other relevant authorities, a plaintiff is not required to anticipate an affirmative defense and negative it in the complaint as the Panel's Decision suggests. Because such specific pleading is not required, this Court should grant this petition to ensure that pleading requirements remain uniform pursuant to the Federal Rules of Civil Procedure Rules 8 and 9.

B. The Panel's Decision Conflicts With Other Circuit Court Precedent Regarding The Requirement To Plead Facts Or Theories In Anticipation Of An Affirmative Defense Such As The Statute Of Limitations.

Tregenza v. Great American Communications Co., 12 F. 3d 717, 718 (7th Cir. 1993) concerned securities claims which had to be brought "within one year after discovery of the facts constituting the violation and within three years after such violation." Invoking *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 1923-1924, 64 L. Ed. 2d 572 (1980), Judge Pozner authored the opinion:

> The statute of limitations is an affirmative defense, and the plaintiff is not required to negate

> an affirmative defense in his complaint. [Citation omitted.] Of course if he pleads facts that show that his suit is time-barred or otherwise without merit, he has pleaded himself out of court. [Citation omitted.]

Id. at 718. *See also Barry Aviation Inc. v. Land O'Lakes Municipal Airport Commission*, 377 F. 3d 682, 688 (7th Cir. 2004), "Complaints need not anticipate defenses; the resolution of the statute of limitations comes after the Complaint stage. [Citation omitted.] This general rule is subject to an important exception. The statute of limitations may be resolved definitively in the face of the complaint when the plaintiff pleads too much and admits definitively that the applicable limitations period has expired."; *Xechem, Inc. v. Bristol-Meyers Squibb Co.*, 372 F. 3d 899, 901 (7th Cir. 2004) "Complaints need not contain any information about defenses and may not be dismissed for that omission. [Citation omitted.] Only where the plaintiff pleads itself out of court – that is, admits all the ingredients of an impenetrable defense – may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6)."

Leading treatises also caution against the practice of pleading in anticipation of potential affirmative defenses. In C. Wright & A. Miller, *Federal Practice and Procedure*, Section 1276, p. 623 (1990), the following advice appears:

> [I]f the plaintiff purports to negative an affirmative defense by way of anticipation but does not admit the effectiveness of the defense in his pleading, the District Court should treat the plaintiff's references to the defense as surplusage.

Not only do other circuits clearly reject the Ninth Circuit's new approach, but so does the leading commentator on federal pleading.

C. The Panel's Decision Conflicts With California Authorities Regarding The Requirement To Plead Facts Or Theories In Anticipation Of An Affirmative Defense Such As The Statute Of Limitations.

Contrary to the Panel's Decision, App. 7, California also follows the same pleading rules as set forth in *Gomez* and *Tregenza*. Only where the claim appears barred on the face of the complaint is a plaintiff required to plead facts which provide relief from the statutory bar. "Because the Complaint does not reveal on its face that it is barred by the statute of limitations, real parties were not required to plead fraudulent concealment as an excuse for late filing. Thus, the fraudulent concealment allegation is mere surplusage, and the trial court was not required to sustain a demurrer or motion to strike directed toward it." *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 24-26, 201 Cal. Rptr. 580, 586-587 (1984).

Accordingly, whether federal authorities or state authorities are followed, here the pleading requirement is the same: A plaintiff is not required to plead in anticipation of an affirmative defense that does not appear to bar the claims on the face of the complaint itself.

CONCLUSION

As set forth above, the federal rules and the relevant decisions of the United States Supreme Court, the Ninth

and other Circuit Courts of Appeal and the Supreme Court of the State of California do not require a plaintiff to plead facts and/or legal theories in his complaint in anticipation of an affirmative defense such as a statute of limitations. Accordingly, Petitioner, like any plaintiff, was entitled to present evidence in support of its theory that Bostik and Southwall conspired to develop and improperly market the Heat Mirror technology, including the required Bostik sealants, in opposition to motions for summary judgment based upon Respondents' statutes of limitations defenses.

To hold to the contrary will require additional "defensive" allegations in many complaints where statute of limitations and other defenses (tolling or other contractual agreements) may be asserted as affirmative defenses. Such an interpretation is contrary to this Court's decisions and the decisions of other courts and learned commentators who have analyzed the issue.

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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435 F.3d 989

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Wasco Products, Inc., *Plaintiff-Appellant*, v. Southwall Technologies, Inc.; Bostik, Inc., *Defendants-Appellees.*	No. 04-15171 D.C. No. CV-02-02926-SBA OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
October 18, 2005 – San Francisco, California

Filed January 13, 2006

Before: J. Clifford Wallace, Stephen S. Trott, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Wallace

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OPINION

WALLACE, Senior Circuit Judge:

Wasco Products, Inc. (Wasco) appeals from the summary judgment granted to the appellees. Wasco sought to toll the applicable statutes of limitations because of an alleged civil conspiracy. We decide here the narrow question of whether Wasco was required to plead a civil conspiracy in order to raise the issue. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.[1]

I.

This action arises out of a dispute over insulated glass units (IGUs). Both appellees, Bostik, Inc. (Bostik) and Southwall Technologies, Inc. (Southwall), were involved in the manufacture of "Heat Mirror" IGUs that Wasco purchased.

A Heat Mirror IGU consists of Southwall's "Heat Mirror Film" suspended between two panes of glass. The film is designed to block ultraviolet and infrared radiation, while allowing the transmission of visible light. Southwall

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[1] Wasco made several other arguments which are addressed by an accompanying memorandum disposition.

manufactured the film and provided manufacturers with guidelines for constructing Heat Mirror IGUs using the film. Bostik manufactured three types of sealants that were used to seal the Heat Mirror IGUs.

Wasco manufactures and assembles skylight systems. Wasco purchased Heat Mirror IGUs from third party manufacturers and incorporated them into its skylights. The Heat Mirror IGUs in dispute contained Southwall's film and Bostik's sealants. Wasco alleges it experienced an elevated failure rate in these Heat Mirror IGUs beginning in 1995.

Wasco has alleged that both Southwall and Bostik knew that Heat Mirror IGUs would be no more durable than normal IGUs and that many would fail prematurely. Despite this knowledge, Wasco alleges that Southwall and Bostik represented to the public and Wasco that their Heat Mirror IGUs were more durable than standard IGUs and would not experience elevated failure rates.

In its opposition to summary judgment, Wasco alleged for the first time that Bostik and Southwall were engaged in a civil conspiracy to misrepresent the quality of the Heat Mirror IGUs in an attempt to toll the statutes of limitations. No allegation of conspiracy or agreement between the companies appears in Wasco's complaint.

II.

Both Southwall and Bostik contend that because Wasco failed to set forth the alleged conspiracy in its complaint, it may not raise the issue to toll the statutes of limitations. As this is a diversity action, we must determine whether federal or California procedural law applies

to this question. Where there is no apparent conflict between federal and state law, we apply federal procedural law. *See Hanna v. Plumer,* 380 U.S. 460, 465 (1965) (if there is "no conflicting state procedure . . . [federal procedural law] would clearly control").

Our court does not appear to have addressed this issue previously. We begin our analysis by observing that the object of the alleged conspiracy is fraudulent: to misrepresent the properties of the Heat Mirror IGUs. Rule 9(b) of the Federal Rules of Civil Procedure requires plaintiffs to plead fraud with particularity. *See In re Stac Elecs. Sec. Litig.,* 89 F.3d 1399, 1405 (9th Cir. 1996) (as amended) ("Rule 9(b) serves to give defendants adequate notice to allow them to defend against the charge").

Other federal courts to consider this issue have required the plaintiff to plead at least the basic elements of the conspiracy, especially the existence of an agreement. *See Montgomery v. City of Ardmore,* 365 F.3d 926, 940 (10th Cir. 2004) (requiring "alleg[ations] [of] specific facts showing an agreement and concerted action" for civil conspiracy claim) (internal quotation marks and citation omitted); *Crowe v. Henry,* 43 F.3d 198, 206 (5th Cir. 1995) (plaintiff, "at the very least, must allege specifically . . . an agreement" for RICO civil conspiracy claim) (internal quotation marks and citation omitted); *Alfus v. Pyramid Tech. Corp.,* 745 F. Supp. 1511, 1521 (N.D. Cal. 1990) ("In civil conspiracy actions, courts insist upon a higher level of specificity than is usually demanded of other pleadings . . . . [P]laintiff's allegations that defendants conspired to commit fraud are insufficient both for failure to plead conspiracy with the requisite particularity and for failure to plead an agreement to participate in an unlawful act").

Although the civil conspiracy is not an element of Wasco's claims, federal courts have repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their pleadings; this rule applies even where the tolling argument is raised in opposition to summary judgment. *See Guerrero v. Gates,* 357 F.3d 911, 920 (9th Cir. 2004) (plaintiff's equitable estoppel defense to statute of limitations was barred where plaintiff "failed to plead with particularity any . . . fraudulent behavior") (affirming dismissal under Rule 12(b)(6)); *389 Orange St. Partners v. Arnold,* 179 F.3d 656, 662-63 (9th Cir. 1999) ("Fraudulent concealment, if affirmatively pleaded and proved" may toll statute of limitations) (affirming summary judgment because of plaintiff's failure to "allege with particularity any fraudulent activity") (as amended); *Grimmett v. Brown,* 75 F.3d 506, 514 (9th Cir. 1996) ("As an initial matter, [plaintiff] never pled the allegedly concealed facts in her complaint. Failure to plead these facts waives this tolling defense") (treating district court ruling as summary judgment and affirming) (citation omitted); *Conerly v. Westinghouse Elec. Corp.,* 623 F.2d 117, 120-21 (9th Cir. 1980) ("Under either California or federal authority, the plaintiff must plead with particularity the facts which give rise to the claim of fraudulent concealment" in order to toll the statute of limitations) (affirming dismissal under Rule 12(b)(6)); *see also Kirtdoll v. City of Topeka,* 315 F.3d 1234, 1234 (10th Cir. 2003) (affirming dismissal for failure to "plead a factual predicate for any tolling theory"); *McCoy v. United States,* 264 F.3d 792, 795 (8th Cir. 2001) (rejecting attempt to toll statute of limitations because plaintiff "did not allege continuing negligent treatment") (affirming summary judgment); *Bull S.A. v. Comer,* 55 F.3d 678, 681-83 (D.C. Cir. 1995) (plaintiff has "burden of *pleading* and

providing equitable reasons for non-compliance" with statute of limitations in order to seek tolling) (concluding plaintiff had properly established equitable tolling applied and reversing summary judgment based on statute of limitations) (internal quotation marks, citation, and punctuation omitted) (emphasis added); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (holding "allegations of fraudulent concealment, which toll the statute of limitations, must meet the [particularity] requirements of" Rule 9(b) and affirming summary judgment because "Larson failed to plead fraud or concealment . . . and raised the issue for the first time in his opposition to Northrop's cross-motion for summary judgment") (citations omitted).

We do not see any principled basis for distinguishing civil conspiracy from these other grounds for tolling the statute of limitations. Based on these precedents and the plain language of Rule 9(b), we hold that under federal law a plaintiff must plead, at a minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent. *Cf. Stac Elecs. Sec. Litig.*, 89 F.3d at 1405 (holding securities section 11 claims sounding in fraud are subject to Rule 9(b) particularity requirements). This requirement applies even if the civil conspiracy allegations are asserted only to toll the statute of limitations and even if they are raised only in opposition to summary judgment. *See Varner v. Peterson Farms*, 371 F.3d 1011, 1019-20 (8th Cir. 2004) (rejecting tolling argument based on "continuing conspiracy or continuing violation" because plaintiffs had failed to "plead sufficient facts . . . to establish an exception to toll the statutes of limitations") (affirming dismissal with prejudice). We need not decide if any additional pleading requirements apply. We also express

no opinion as to pleading requirements if the object of the conspiracy is non-fraudulent.

California law does not appear to differ from federal law on this issue. In *Wyatt v. Union Mortgage Co.*, the California Supreme Court held that "when a civil conspiracy is *properly alleged and proved,* the statute of limitations does not begin to run . . . until the 'last overt act' pursuant to the conspiracy has been completed." 598 P.2d 45, 53 (Cal. 1979) (citation omitted) (emphasis added). Under California law, "[t]o state a cause of action for conspiracy, *the complaint* must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." *Cellular Plus, Inc. v. Superior Court,* 18 Cal. Rptr. 2d 308, 314 (Ct. App. 1993) (internal quotations and citations omitted) (emphasis added) (stating these elements of civil conspiracy had also been extended to antitrust conspiracies); *see also Gen. Am. Life Ins. Co. v. Rana,* 769 F. Supp. 1121, 1125 (N.D. Cal. 1991) ("[T]he complaint must allege . . . the formation and operation of a conspiracy") (considering civil conspiracy allegations under California law). Therefore, under both federal law and California law, Wasco was required to plead the basic elements of civil conspiracy in order to toll the statute of limitations. Because both federal and California law require Wasco to plead the basic elements of civil conspiracy, we apply federal procedural law. *See Hanna,* 380 U.S. at 465.

III.

Wasco has failed to allege that Southwall and Bostik ever formed an agreement to misrepresent the properties

of the sealant. Without any allegation that Bostik and Southwall agreed to commit wrongful acts, Wasco has failed under federal law to allege the most basic and fundamental element of a civil conspiracy.

Wasco therefore may not toll the statute of limitations based on its allegations of civil conspiracy, which appear for the first time in its response to the summary judgment motion. "[T]he necessary factual averments are required with respect to each material element of the underlying legal theory . . . . Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990).

AFFIRMED.

166 Fed.Appx. 910

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASCO PRODUCTS, INC., Plaintiff-Appellant, v. SOUTHWALL TECHNOLOGIES, INC.; BOSTIK, INC., Defendants-Appellees.	No. 04-15171 D.C. No. CV-02-02926-SBA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued & Submitted October 18, 2005
San Francisco, California

(Filed Jan. 13, 2006)

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

Wasco Products, Inc. (Wasco) appeals from the summary judgment based upon the economic loss doctrine and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

the applicable statutes of limitations. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

I.

We first turn to the standing issues raised by Bostik, Inc. (Bostik) and Southwall Technologies, Inc. (Southwall). Although these issues were never argued in the district court, standing may be raised for the first time on appeal. *See Animal Prot. Inst. v. Hodel of Am.*, 860 F.2d 920, 923 (9th Cir. 1988). Because of the lack of any current business relationship between the parties, there is no "immediate threat" to Wasco, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), nor any likelihood Wasco "will be wronged again." *See Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004). Accordingly, we conclude that Wasco lacks standing to seek injunctive relief.

We reject Southwall's self-harm standing argument, however, because we conclude there is a genuine issue of material fact as to causation of the harm. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

II.

We affirm dismissal of Wasco's tort claims on the basis of the economic loss doctrine and the district court's application of the statutes of limitations for the reasons

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[1] One of Wasco's arguments – that a civil conspiracy tolls the applicable statutes of limitations – is addressed by an accompanying opinion.

stated by the district court. Wasco has raised four arguments on appeal for tolling the statute of limitations. We address each in turn.

Wasco's argument for equitable tolling is waived because Wasco failed to argue it on appeal. Although included in a subject heading, all of Wasco's arguments were applicable to equitable estoppel, not equitable tolling. Thus, this argument is waived. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review").

Wasco next argues that equitable estoppel prevents appellees from asserting the statutes of limitations. We review the district court's decision whether to apply the equitable estoppel doctrine for an abuse of discretion. *See Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). There was significant evidence that the alleged statements of the appellees did not induce Wasco to delay filing suit and that Wasco did not rely on the statements. In particular, Robert Sampson, Wasco's designated technical expert, testified that he did not believe other defects were responsible for the elevated failure rate, that he was suspicious of the sealants at all times since 1995, and that he never believed that the sealant was not at least a potential cause of the elevated failure rate. Even viewing all disputed facts in a light most favorable to Wasco, the district court did not abuse its discretion in declining to apply equitable estoppel.

Wasco's third tolling argument, that a "civil conspiracy" tolls the statute of limitations, fails for the reasons stated in an accompanying opinion.

Finally, Wasco's argument that a "tolling agreement" extended the statute of limitations period is waived because it was never argued in the district court. Although stated in a statement of facts, it was never argued and never ruled upon. Without any proffered explanation for this default, the argument is waived. *See Monetary II Ltd. P'ship v. Comm'r,* 47 F.3d 342, 347 (9th Cir. 1995) ("As a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances") (quotation marks and citation omitted).

Because the district court properly granted summary judgment against Wasco on all claims, its decision to deny Wasco's class certification motion as moot was also proper. Similarly, its decision to deny partial summary judgment on the unfair competition claims was correct because the statute of limitations barred the claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WASCO PRODUCTS, INC.	No. C 02-2926 SBA
Plaintiff,	**ORDER**
v.	[Docket Nos. 228, 233, 268, 306]
SOUTHWALL TECHNOLOGIES INC., and BOSTIK, INC.,	(Filed Dec. 22, 2003)
Defendants. /	

This matter comes before the Court on Plaintiff Wasco Products, Inc's ("Wasco") Motion for Summary Judgment Re: Unfair Business Practices and Unfair Competition Claims Against Southwall Technologies, Inc. ("Southwall") [Docket No 228]; Defendant Southwall's Motion for Summary Judgment Re: Wasco's Remaining Claims [Docket No. 268]; Defendant Bostik, Inc.'s ("Bostik") Motion for Summary Judgment Re: Claims and Issues Against Wasco Products, Inc. [Docket No. 306] and; Plaintiff Wasco's Motion for Class Certification [Docket No. 233].

Having read and considered the papers presented by the parties in the papers and the oral arguments of counsel at a hearing on December 16, 2003, the Court hereby GRANTS Southwall's motion for summary judgment and GRANTS Bostik's motion for summary judgment and DENIES Wasco's motion for partial summary judgment. Furthermore, the Court DENIES as moot Wasco's motion for class certification.

I. BACKGROUND

A. Factual Background

This matter involves a dispute over failed Heat Mirror insulated glass units ("IGUs"). The Heat Mirror IGU is created by suspending a Heat Mirror film between two panes of glass using a sealant. Defendant Southwall manufactured said Heat Mirror film, which is a plastic film designed to transmit visible light while blocking most ultraviolet and infra-red rays. Southwall also provided Heat Mirror IGU manufacturers with a "Heat Mirror Manual" which set forth the manufacturing process for Heat Mirror IGUs, including the materials that were to be used to manufacture Heat Mirror IGUs.

Defendant Bostik manufactures polyurethane sealants that seal the perimeter of insulated glass for both standard and Heat Mirror IGUs. From the mid-1980s to the early 1990s, Bostik developed three sealants, the 3180 HM, the 3190 HM and the 3199 HM (the "HM Sealants"), that were approved by Southwall for use in fabricating Heat Mirror IGUs. Southwall also included Bostik's HM Sealants in Southwall's Heat Mirror Manual as approved sealants. Since late 1999 or early 2000, Heat Mirror IGU manufacturers have ceased using Bostik polyurethane sealants to fabricate Heat Mirror IGUs.

Plaintiff Wasco manufacturers and assembles skylight systems. Wasco purchased Heat Mirror IGUs from third party manufacturers and incorporated the Heat Mirror IGUs into its skylight systems. Wasco alleges in its Third Amended Complaint (the "TAC") that some of the skylights it installed containing Heat Mirror IGUs failed prematurely due to a defective Bostik sealant, 3190 HM, used in the manufacture of the IGUs. Wasco also alleges

that Defendants knew that Heat Mirror IGUs, properly manufactured pursuant to the steps set forth in the Heat Mirror Manual and properly installed, would fail early due to premature degradation of the 3190 HM sealant. Wasco contends that despite this knowledge, both Bostik and Southwall represented to the public and to Wasco that the Heat Mirror IGUs were as durable if not more durable than standard ICUs. Specifically, Wasco alleges that Southwall misrepresented to the public that the Heat Mirror IGU was extensively tested, that Southwall and Bostik misrepresented that the HM Sealants could safely operate in environments of up to 200 degrees F and that Southwall and Bostik covered up the fact that the Heat Mirror IGUs were prematurely failing. Wasco further contends that it purchased Heat Mirror IGUs from Ultra Glass, a Heat Mirror IGU manufacturer recommended by Southwall, based on these alleged misrepresentations.

B. Procedural Background

Wasco filed its original complaint on June 18, 2002 and a First Amended Complaint ("FAC") on July 10, 2002. On August 19, 2002, Defendant Bostik moved this Court to dismiss the causes of action in Plaintiffs First Amended Complaint ("FAC") against Bostik for breach of express and implied warranties, fraud, negligent interference with prospective advantage, and unfair/false or misleading business practices. In an order filed November 13, 2002, this Court granted in part and denied in part Bostik's Motion to Dismiss. Specifically, the Court, analyzing Plaintiffs claims under California law, dismissed Wasco's First, Second, and Third claims for breach of express and implied warranties, Fourth Claim for Fraud (Intentional Misrepresentation), Fifth and Sixth Claims for Fraud

(Intentional Concealment), and Ninth Claim for Negligent Interference with Prospective Advantage. The Court declined to dismiss Wasco's Eleventh and Thirteenth Claims for Unfair Business Practices and False and Misleading Business Practices in violation of California Code §17200 and §17500, finding that the facts in the Complaint were sufficiently specific to support these claims. The Court also provided Wasco leave to file a Second Amended Complaint ("SAC") to cure the deficiencies noted in the FAC.

On December 19, 2002, Wasco filed its SAC. The SAC alleged the same causes of action alleged in the FAC, and supplemented the FAC with additional factual allegations. On January 8, 2003, and January 9, 2003, Bostik and Southwall, respectively, filed the motions to dismiss Wasco's SAC. The Court dismissed with prejudice Wasco's claims for Breach of Implied Warranty, Fraud based on Concealment or Suppression of Information, Negligent Interference with Prospective Economic Advantage, and Breach of the Implied Covenant of Good Faith and Fair Dealing. The Court also dismissed with prejudice Wasco's claim against Bostik for Breach of Express Warranty, to the extent the claim was based on Bostik's conventional sealant. To the extent that Wasco's claim for Breach of Express Warranty was premised on Bostik's 3190 HM sealant, the Court declined to dismiss it. Finally, Wasco's claim for Fraud based on Intentional Misrepresentation was dismissed without prejudice and the Court granted Wawa leave to file a Third Amended Complaint to allege new, particular facts that satisfy Rule 9(b), solely with respect to the claim for intentional misrepresentation based on misrepresentations contained in the Heat Mirror Manual.

On June 27, 2003, Wasco filed its Third Amended Complaint ("TAC"). Defendants moved to strike Wasco's new allegations of intentional misrepresentation on the ground that they exceeded the scope of the Court's prior order. The Court granted Defendants' motion to strike and dismissed Wasco's claim for intentional misrepresentation with prejudice because Wasco failed to plead with particularity facts which would give rise to a claim for intentional misrepresentation with respect to the 3190 HM sealant.

On September 18, 2003, Wasco filed a motion for summary judgment against Southwall for its unfair business practices and unfair competition claims. On October 14, 2003, Southwall filed a motion for summary judgment on Wasco's remaining claims. On November 4, 2003, Bostik filed a motion for summary judgment on Wasco's remaining claims.

II. LEGAL STANDARD

A. Legal Standard For Summary Judgment

Under Federal Rule of Civil Procedure 56, a court may properly grant a motion for summary judgment if the pleadings and materials demonstrate that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment may be granted in favor of a defendant on an ultimate issue of fact where the defendant carries its burden of "pointing out to the district court that

there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

To withstand a motion for summary judgment, the non-movant must show that there are genuine factual issues which can only be resolved by the trier of fact. *Anderson*, 477 U.S. at 250. The nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The court's function, however, is not to make credibility determinations. *Anderson*, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

B. Legal Standards for Admissibility and Consideration of Evidence

To be considered in connection with a motion for summary judgment, "documents must be authenticated by and attached to an affidavit [or declaration] which meets the requirements of [Federal Rule of Civil Procedure] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Hal Roach Studios. Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1991) (quotation omitted); *accord Cristobal v. Siegal*, 26 F.3d 1488, 1494 (9th Cir. 1993).

Rule 56(e) requires that affidavits or declarations filed in connection with a motion for summary judgment be based on personal knowledge, set forth facts that would be admissible as evidence, and affirmatively show that the affiant is competent to testify to the matters contained therein. *See Sheet Metal Workers' Int'l Ass'n Local Union*

No. 359 v. Madison Indus.. Inc., of Ariz., 84 F.3d 1186, 1193 (9th Cir. 1996). The court has the discretion to strike affidavits that do not comply with Rule 56(e). *Id.* "To raise a genuine issue sufficient to survive summary judgment, an affidavit must set forth specific facts tending to show the truth of the allegation." *Id.* It is an abuse of discretion to consider affidavits are "not made on personal knowledge [and do] not set forth facts that would be admissible in evidence" *Block v. City of Los Angeles,* 253 F.3d 410, 419 (9th Cir. 2001).

That the evidence may be available in plaintiff's voluminous exhibits is of no consequence. The Court is not obligated to consider matters not specifically brought to its attention. *See* Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial 14.145.2 (Rutter Group 1993). The opposition to a summary judgment motion must designate and reference specific triable facts. *Orr v. Bank of Am., NT & SA,* 285 F.3d 764, 775 (9th Cir. 2002) (holding that "when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court in its discretion may exclude the evidence"); *Schneider v. TRW. Inc.,* 938 F.2d 986, 990-91 n.2 (9th Cir. 1991) ("[T]he law of this circuit . . . recognizes that a district court is under no obligation to mine the full record for triable issues of fact.") (citation omitted); *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec,* 854 F.2d 1538, 1545 (9th Cir. 1988) ("In the absence of specific facts, as opposed to allegations, showing the existence of a genuine issue for trial, a properly supported summary judgment motion should be granted."); *Frito-Lay. Inc. v. Willoughby,* 863 F.2d 1029, 1034 (D.C. Cir. 1988) ("Appellant's failure to designate and reference triable facts was, in light of the language of Rule

56(c) and governing precedent, fatal to its opposition."); *Nissho-Iwai Am. Corp. v. Kline,* 845 F.2d 1300, 1307 (5th Cir. 1988) (rejecting notion that "the entire record must be searched and found bereft of a genuine issue of material fact before summary judgment may be properly entered"). Thus, it is immaterial that evidence helpful to plaintiff may have been presented somewhere in the record.

III. ANALYSIS

A. The Parties' Contentions

Wasco argues that it is entitled to summary judgment under California's Unfair Competition Law[1] (the "UCL") because Southwall "intentionally and consistently misled the entire industry regarding the durability of the Heat Mirror System and its component parts." Wasco's M.P.A. I.S.O. M.S.J. at 18.

Southwall argues that it is entitled to summary judgment with respect to Wasco's two remaining claims against it: negligence (Count 3 of the TAC) and the UCL (Counts 5-7 of the TAC). Southwall contends that Wasco's claim for negligence is barred by the "economic loss rule." Southwall further contends that Wasco's UCL claims fail because: (1) they are barred by the statute of limitations; and (2) Wasco cannot show that it is entitled to the relief provided by the UCL. Moreover, Southwall contends that Wasco's claims under both causes of action are barred or limited based on the class settlement approved and entered in the case captioned *McKernan v. Black & Decker, et*

[1] California Bus. & Prof. Code §§ 17200 *et seq.* and 17500 *et seq.*

al., Santa Clara Sup. Ct. Case No. CV772488 ("McKernan") on February 22, 2001.

Bostik argues that it is entitled to summary judgment with respect to Wasco's three remaining claims against it: breach of express warranty (Count 1 of the TAC), strict products liability (Count 4 of the TAC) and the UCL (Counts 5 & 7 of the TAC). Bostik contends that Wasco's claim for breach of express warranty fails because: (1) Wasco and Bostik were not in contractual privity; (2) Wasco failed to provide Bostik with notice of the alleged breach of warranty within a reasonable time after discovery; and (3) Wasco's claim is barred by the statute of limitations. Bostik contends that Wasco's claim for strict products liability fails because: (1) Wasco's claim is barred by the statute of limitations; and (2) Wasco's claim is barred by the "economic loss rule." Bostik further contends that Wasco's UCL claims fail because: (1) Wasco's claims are barred by the statute of limitations; (2) Wasco lacks standing to assert such claims in either an individual or representative capacity; (3) Wasco claims are barred due to the prohibition on the extraterritorial application of the UCL and (4) Wasco cannot show that it is entitled to the relief provided by the UCL.

B. Breach of Express Warranty (Count 1 of the TAC)

Wasco does not oppose Bostik's motion for summary judgment on Wasco's First Claim for Breach of Express Warranty. Wasco admits that "consistent with the Court's earlier rulings, Wasco cannot appropriately defend against the motion as it relates to the warranty claims relating to Bostik 3190 HM Sealant." Plaintiff's Opp. to Defendant

Bostik's M.S.J. at 1. Curiously, Wasco states that it "would have agreed to dismiss the claim if it had been requested to do so." *Id.* The Court reminds the parties that this issue would have been more efficiently resolved during the meet and confer process and GRANTS Bostik's motion for summary judgment with respect to Wasco's First Claim for Breach of Express Warranty as it relates to Bostik's 3190 HM Sealant.

C. Wasco's Tort Claims (Counts 3 and 4 of the TAC)

Both Southwall and Bostik argue that Wasco's tort claims are barred by the "economic loss rule." Under the economic loss rule, a manufacturer or distributor may be liable in strict liability or negligence for physical injury to property caused by a defective product but not for purely economic losses. *KB Home v. Sup. Ct.*, 112 Cal. App. 4th 1076, 1084 (2003). The rule bars recovery in tort for economic damages caused by a defective product unless those losses are accompanied by some form of personal injury or damage to property *other than the defective product itself. Jimenez v. Sup. Ct.*, 29 Cal. 4th 473, 483 (2002); *KB Home v. Sup. Ct.*, 112 Cal. App. 4th at 1079.

At the outset, the Court notes that the economic loss rule applies regardless of whether the plaintiff and the defendant were in privity of contract. *Astrium, S.A.S. v. TRW. Inc.*, 254 F. Supp. 2d 1129, 1136-1137 (C.D. Cal. 2003); *see Aas v. Sup. Ct.*, 24 Cal. 4th 627, 654-53 (2000) (barring plaintiffs' tort claims based on the economic loss rule where there was no privity of contract); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18-19 (1965) (applying the economic loss rule in an action between a truck purchaser

and truck manufacturer, where they were not in privity of contract); *Werwinski v. Ford Motor Co.*, 286 F.3d 661. 681 (3rd Cir. 2002) (applying the economic loss rule to warranty and fraud claims, where no breach of contract claim was alleged); *Cooper Power Sys. v. Union Carbide Chemicals & Plastics Co.*, 123 F.3d 675, 681 (7th Cir. 1997) (finding that "privity of contract is not an element of the economic loss doctrine").

In order to apply the economic loss rule, "we must first determine what the product at issue is. Only then do we find out whether the injury is to the product itself (for which recovery is barred by the economic loss rule) or to property other than the defective product (for which plaintiffs may recover in tort)." *Jimenez v. Sup. Ct.*, 29 Cal. 4th at 483. In *Jimenez,* the California Supreme Court rejected Defendant window manufacturers' argument that the product at issue was the entire house in which their windows were installed in and held that the manufacturer of a defective window installed in a mass-produced home maybe held strictly liable in tort for damage that the windows' defects cause to other parts of the home in which they were installed. *Id.* at 484. The California Supreme Court, however, did not provide any direct guidance as to how to determine what the product at issue is. *See Jimenez v. Sup. Ct.*, 29 Cal. 4th at 484 ("We have no occasion here to consider whether defective raw materials should be treated in the same manner as component parts or whether there may be situations in which the economic loss rule would bar recovery for damages that a defective component part causes to other portions of the finished product of which it is a part.").

In *KB Home v. Sup. Ct.*, 112 Cal. App. 4th 1076 (2003), KB Home sued Consolidated Industries Corp. ("Consolidated") alleging 11 causes of action arising from KB Home's replacement of defective furnaces manufactured by Consolidated, including tort claims for negligence and strict liability. *Id.* at 1081. In order to meet emission standards, Consolidated had installed stainless steel NOx rods above the burners in the furnaces at issue. *Id.* at 1080. Neither the NOx rods nor the clips used to secure them in place over the furnace burner were manufactured by Consolidated. *Id.* According to KB Home, the NOx rods were defective and generated excess heat that damaged other parts of the Consolidated furnaces, including melting and cracking burners, cracking heat exchangers, and causing fire box failures. *Id.* The trial court issued an order that the furnaces were "a single manufactured product and did not consider the component parts of that integrated product as separate products." *Id.* at 1082. Stated differently, in the trial court's view, any damage to the furnaces' heat exchangers or burners caused by the NOx rods was damage to the product itself, not damage to "other property" properly recoverable under the economic loss rule. *Id.* On appeal, the Court of Appeals held that:

> [D]istinguishing between 'other property' and the defective product itself in a case involving component-to-component damages *requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product.* If that is the case, permitting tort recovery when the defective part causes physical injury to other components is consistent with the underlying principle recognizing a manufacturer's liability in tort 'by requiring his goods to

> match a standard of safety defined in terms of conditions that create unreasonable risks of harm.' If not, it is fair to impose upon the consumer (in this case, KB Home) 'the risk that the product will not match his economic expectations unless the manufacturer agrees that it will,' and thus to limit damages to those recoverable under the law of contractual warranty.

Id. at 1087 (citations omitted) (emphasis added).

Following *KB Home,* then, in order to apply the economic loss rule, the Court must determine whether Bostik's sealant is a sufficiently discrete element of the IGU such that it is not reasonable to expect its failure invariably to damage other portions of the IGU. While "[d]etermining the nature of the product at issue and whether the injury for which recovery is sought is to the product itself or to property other than the defective product, at least in cases involving component-to-component damage, is generally the province of the trier of fact. . . . [s]ummary judgment, of course, may be proper if 'the uncontradicted facts established through discovery are susceptible of only one legitimate inference.'" *KB Home,* 112 Cal. App. 4th at 1080 n.2 (citations omitted).

In the instant case, Wasco seeks recovery in tort for economic damages caused by sealants that were allegedly defective.[2] Applying the *KB Home* test, it is clear that

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[2] With respect to the negligence claim at issue here, Wasco alleges that Southwall breached its duty "by specifying and requiring plaintiff to use a defective sealant that was not fit for its required use, in that it develops leaks within 3 to 5 years due to an over-sensitivity to u.v. light and high temperature [sic] experienced in Heat Mirror units." TAC at ¶ 105. Furthermore, Southwall's negligent conduct "proximately caused the IGUs to develop premature leaks causing condensation or 'fogging'

(Continued on following page)

Bostik's sealant is so integrated into the IGU that the sealant loses its separate identity. The sealant is required to connect all of the component parts of the IGU to one another and create a single product – an IGU. Duffy Decl. at ¶ 5. Furthermore, once it is incorporated, the sealant cannot be removed from the IGU without completely destroying the IGU. *Id.* Therefore, it is not reasonable to expect that the failure of the sealant would not invariably damage other portions of the IGU. In contrast, the NOx furnace rods at issue in *KB Home* were an optional component that could be removed from the furnace. *KB Home,* 112 Cal. App. 4th at 1080, 1087. Wasco, as the nonmoving party, fails to present any specific facts to contradict this characterization of the sealant. Thus, because the uncontradicted facts established through discovery are susceptible of only one legitimate inference, the Court finds that the product at issue is the IGU as a whole.

Wasco has not alleged any damage to any property other than the IGU itself.[3] TAC ¶ 105-06, 110-111. Since

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inside the IGUs." TAC at ¶ 106. Similarly, with respect to the strict liability claim at issue in this case, Wasco alleges that "Bostik polyurethane sealants, including 3190 HM sealant, are defective in that they prematurely breaks [sic] down due to over-sensitivity to heat and u.v. light." TAC at ¶ 110. Moreover, "Bostik's sealant failure has caused property damage to Heat Mirror IGUs manufactured and sold by plaintiff and others resulting in condensation or 'fogging' within the IGU" TAC at ¶111.

[3] Wasco attempts to argue that its negligence claim is not solely directed towards the products itself but to Southwall's negligent misrepresentations as well and therefore, the economic loss rule should not apply. Wasco's argument is not persuasive as a matter of law. *See AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1087 (8th Cir. 1998) (holding that fraud and misrepresentation claims to recover economic losses must be independent of the Article 2 contract to avoid preclusion by the economic loss doctrine); *Cooper Power Sys. v. Union Carbide*

(Continued on following page)

Wasco's tort claims are barred by the economic loss doctrine, there is no triable issue of material fact as to the challenged causes of action. Accordingly, the Court GRANTS Defendant Southwall's motion for summary judgment with respect to negligence (Count 3 of the TAC) and GRANTS Defendant Bostik's motion for summary judgment with respect to strict products liability (Count 4 of the TAC).

D. The UCL (Counts 5-7 of the TAC)

1. Statute of Limitations[4]

Resolution of a statute of limitations defense is normally a question of fact. *Snapp & Assoc. Ins. Services, Inc. v. Malcolm Bruce Burlingame Robertson, et al.*, 96 Cal. App. 4th 884, 889 (2002). When the uncontradicted facts established through discovery are susceptible of only one legitimate inference, however, the court may determine the matter as one of law. *Id.* at 889-90.

An action under the UCL "shall be commenced within four years after the cause of action accrued." Cal. Bus. & Prof. Code § 17208. The "discovery rule," which delays accrual of certain causes of action until the plaintiff has actual or constructive notice knowledge of facts giving rise

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Chems. & Plastics Co., 123 F.3d 675, 682 (7th Cir. 1997) (noting that misrepresentations "that ultimately concern the quality of the product sold" are covered by the economic loss rule).

[4] Since the Court grants Defendant Southwall's motion for summary judgment with respect to negligence (Count 3 of the TAC) and grants Defendant Bostik's motion for summary judgment with respect to strict products liability (Count 4 of the TAC) the Court does not need to address the Defendants' statute of limitations arguments with respect to Wasco's tort claims.

to the claim, "does not apply to unfair competition actions." *Snapp,* 96 Cal. App. 4th at 891; *Stuz Motor Car of America v. Reebok Int'l., Ltd.,* 909 F. Supp. 1353, 1363 (C.D. Cal. 1995). Thus, "'the statute begins to run . . . irrespective of whether plaintiff knew of its accrual, unless plaintiff can successfully invoke the equitable tolling doctrine.'" *Snapp,* 96 Cal. App. 4th at 891, citing, *Stuz* 909 F. Supp. at 1363; *see Karl Storz Endoscopy-Am., Inc. v. Surgical Techs., Inc.,* 285 F.3d 848, 857 (9th Cir. 2002) (noting that claims under California Business and Professions Code § 17200 *et seq.* are subject to a four-year statute of limitations which [begin] to run on the date the cause of action accrued, not on the date of discovery). A cause of action "accrues" when the party seeking relief is "entitled to begin and prosecute an action thereon." *Romano v. Rockwell Intl. Inc.,* 14 Cal. 4th 479, 487 (1996).

Wasco filed its Complaint on June 18, 2002. For Wasco's UCL claims to be timely, they would had to have accrued no earlier than June 18, 1998. But the evidence developed through discovery demonstrates that Wasco had notice of elevated sealant failure rates in Heat Mirror IGUs as early as 1995. In a September 6, 1995 letter to Wasco's supplier of Heat Mirror IGUs, Ultra Building Systems ("Ultra"), Robert Sampson, formerly Wasco's Marketing and Technical Manager, writes:

> We are currently experiencing a much higher incidence of seal failures in Heat Mirror units in the field. . . . In addition to this, we recently encountered 3 residences with multiple failures. . . . These recent incidents are not included in aforementioned figures. I am very concerned about this problem.
>
> . . . .

> Clearly we have to determine why the failure incidents are this high and how we can significantly improve this performance.

Columbia Decl. Exh. 11. Mr. Sampson also testified in his deposition that the allegedly defective Heat Mirror IGUs had begun to fail prematurely as early as 1995. *Id.* Exh. 31 at 52:19-53:1. The evidence developed through discovery also demonstrates that Wasco had notice of elevated sealant failure rates in conventional IGUs in 1996. Mr. Sampson testified in his deposition that Wasco stopped purchasing Bostik's conventional sealants in 1996 because Wasco believed the sealants did not work. Scheidemantle Decl. Exh. 1 at 28:21-23; Exh. 6 at 172:10-14. Finally, in a letter to Carefree Window (successor to Ultra) dated October 6, 1997, Mr. Sampson states that "the source o the problem [with the Heat Mirror IGUs] relates to variability in the quality of the sealant purchased from Bostik . . . [and that these failures are] related to adhesion failures between the glass and the sealant. *Id.* Exh. 4. Thus, the evidence obtained through discovery shows that Wasco was "entitled to begin and prosecute an action on" the IGU failures due to allegedly defective Bostik sealant by no later than October 6, 1997.

Wasco has not presented any evidence to the contrary. Instead, Wasco argues that Defendants' acts are sufficiently related to constitute a continuing violation. Under the continuing wrong theory, a plaintiff can recover for a series of wrongful acts, even if the earlier acts fell outside the statute of limitations. *See Second Chance Body Armor v. American Body Armor,* 1996 U.S. Dist. LEXIS 14561, at *16 n.6 (ND. Ill. 1996); *see also Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989); *Taylor v. Meirick,* 712 F.2d 1112, 1118-19 (7th Cir. 1983). But the doctrine does

not apply "when the harm is definite and discoverable, and nothing prevented the plaintiff from coming forward and seeking redress." *Wilson v. Giesen,* 956 F.2d 738, 743 (7th Cir. 1992). Nor does it apply when the plaintiff "knew or should have known of the violation but nonetheless failed to come forward and file suit at an earlier time." *Moskowitz v. Trustees of Purdue Univ.,* 5 F.3d 279, 282 (7th Cir. 1993); *see Morgan v. Regents of the University of California,* 88 Cal. App. 4th 52, 65 (2000). As discussed, *supra,* Wasco knew by no later than October 6, 1997 that the source of Wasco's problem with the Heat Mirror IGUs was allegedly defective sealant manufactured by Bostik. Therefore, the continuing violation doctrine is inapplicable.

Accordingly, the Court concludes that Wasco's UCL claims accrued on October 6, 1997 with respect to the Heat Mirror sealants and in 1996 with respect to Bostik's conventional sealants. Thus, absent equitable tolling of the statutory periods, or an estoppel to assert them, Wasco filed its complaint too late.

A. Equitable Tolling

The doctrine of equitable tolling is a rule of procedure adopted by the courts and operates independently of the California Code of Civil Procedure. *Mills v. Forestex Co.,* 108 Cal. App. 4th 625, 650 (2003). The rule relieves a "plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." *Id.*, citing, *Addison v. State of California,* 21 Cal. 3d 313, 317-19 (1978).

Wasco argues that it did not suffer damages in 1995 because Ultra was compensating Wasco for its replacement IGUs pursuant to the terms of its warranty and that this pattern of replacement ended in 1997. But Wasco cites no evidence that Ultra had any warranty obligations to Wasco, that Ultra fulfilled those obligations, if any, in 1995 and 1996, or that Wasco made any claims under the alleged warranty in the applicable time period. Indeed, the evidence is directly contrary to Wasco's contentions. In a letter dated October 6, 1997, Mr. Sampson wrote to Carefree Window (Ultra's successor) that Ultra ceased paying warranty claims in the beginning of 1995. Scheidemantle Decl. Exh. 4. Thus, the Court finds that there is no basis for equitable tolling.

B. Equitable Estoppel

Wasco also argues that the Defendants should be estopped from asserting the statute of limitations as a defense because their conduct induced it into forbearing suit within the applicable limitations period.[5] A finding of equitable estoppel rests on the consideration of a non-exhaustive list of factors, including: (1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its

[5] It is not clear from Wasco's moving papers whether Wasco actually intends to argue this point separately from fraudulent concealment. In its opposition to Bostik's motion for summary judgment, Wasco merely states that it was not put "on notice of Defendants' wrongful conduct due to Bostik's concealment." Plaintiffs Opp. to Bostik's M.S.J. at 4.

conduct, and (3) the extent to which the purposes of the limitations period have been satisfied. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176-1177 (9th Cir. 2000). The Seventh Circuit has further explained that equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped." *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 384 (2003) (citations omitted). The defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit; the defendant's mere denial of legal liability does not set up an estoppel. *Id.* at 384 n.18.

In late 1997 and early 1998, both Southwall and Bostik met with Wasco to examine a number of IGUs to investigate the cause of Wasco's failures. Columbia Decl. Exh. 14 (discussing Southwall's analysis of IGUs from Wasco skylights); Exh. 15 (detailing Bostik's analysis of IGUs from Wasco's skylights). Both Southwall and Bostik concluded that Wasco's IGU supplier had failed to assemble the IGUs properly. *See id.* Wasco argues that both Southwall and Bostik misled Wasco into believing that its claims for damages were properly directed at Wasco's IGU supplier. The evidence developed through discovery, however, conclusively demonstrates that Wasco did not reasonably rely on these alleged misrepresentations. Mr. Sampson testified in his deposition that at these meetings, he disagreed with the conclusions of Southwall and Bostik and despite their statements to the contrary, he "knew that the sealant had failed." Scheidemantle Decl. Exh. 1 at

33:13-36:20, 41:6-44:2. The only evidence that Wasco has submitted to show its alleged reliance is a letter from Wasco President Gregory Pojani to the President of Southwall Technologies from October 29, 1997. Mr. Pojani states:

> My technical manager, Bob Sampson and I visited your facilities on October 21, 1997 to meet with Brian Kennedy and discuss your findings from the sample (seal failure) product which we had sent to your lab for analysis prior to our visit. As you can see from the attached inspection report, it was clearly the fault of Southwall's licensed fabricator [Carefree] . . . and we would like Southwall to assist us in resolving the matter between Southwall, Carefree and Wasco.

Tate Supp. Decl. Exh. 75.

But if a misrepresentation is to equitably estop Defendants from asserting the statute of limitations, Wasco must show (1) its reliance on these statements and (2) that its reliance was *reasonable. Santa Maria,* 202 F.3d at 1177. Even if Mr. Pojani's letter is construed in the light most favorable to the Plaintiff, Wasco cannot show that (1) it relied on the Defendants' statements nor (2) if it did, that its reliance on Defendants' statements was reasonable. Mr. Sampson's October 6, 1997 letter, which is dated 23 days before Mr. Pojani's October 29 letter stated that Mr. Sampson concluded that the *sealants* were at fault. Scheidemantle Decl. Exh. 4. Mr. Sampson further testified that in March 1998, 5 months after Mr. Pojani's Oct. 29 letter, he was *still* "confident" that Bostik's sealants were at fault. Scheidemantle Decl. Exh. 1 at 33:13-36:20, 41:6-44:2. In combination with the evidence cited, *supra, Wasco* cannot show that it in fact relied on the statements or that

its reliance on Defendants' alleged misrepresentations was reasonable. Therefore, there is no basis to estop Defendants from asserting that Wasco's UCL claims are barred by the statute of limitations. *Lantzy,* 31 Cal. 4th at 384 (noting that plaintiff must show that he reasonably relied on defendant's representation to refrain from bringing timely action).

C. Fraudulent Concealment

Wasco also contends that the Defendant's should be estopped from asserting the statute of limitations as a defense under a "fraudulent concealment" theory. *Snapp,* 96 Cal. App. 4th at 890. Because fraud is the basis of the estoppel, the same pleading and proof is required, namely, the plaintiff must show (a) the substantive elements of fraud, and (b) an excuse for late discovery of the facts. *Id.*

As discussed, *supra,* Wasco has not presented any evidence sufficient to create a genuine issue of material fact with respect to its alleged actual or reasonable reliance on Southwall's and Bostik's statements. Moreover, the Court has already found that Wasco knew by no later than October 6, 1997 that the source of its Heat Mirror IGU problems was allegedly defective Bostik's sealant. Accordingly, the fraudulent concealment doctrine is inapplicable. *See Snapp,* 96 Cal. App. 4th at 890-91 (fraudulent concealment "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim").

D. Conspiracy

Finally, Wasco contends, for the first time in its opposition, that Bostik and Southwall engaged in a civil conspiracy that tolls the statute of limitations. "If a civil conspiracy is *properly alleged and proved,* the statute of limitations does not begin to run on any part of a plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed." *Wyatt v. Union Mortgage Co.,* 24 Cal. 3d 773, 786 (1979) (emphasis added); *see Dobard v. San Francisco Bay Area Rapid Transit District,* 1993 U.S. Dist. LEXIS 13677, at *17 (N.D. Cal. 1993). Liability for a civil conspiracy requires three elements: (1) formation of a conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from the operating of the conspiracy. *People ex rel. Kennedy v. Beaumont Investment. Ltd.,* 111 Cal. App. 4th 102, 137 (2003); *see Dobard,* 1993 U.S. Dist. LEXIS 13677, at *17. "The requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances. . . . Tacit consent as well as express approval will suffice." *Wyatt,* 24 Cal. 3d at 785 (citations omitted).

The Court has reviewed the evidence submitted by Wasco in support of its allegation, including memorandums written by Bostik and Southwall and letters between Bostik and Southwall. *See*, e.g., Tate Decl. Exhs. 20, 23, 25, 41, 42, 43, 50; Wasco's Opp. to Southwall's M.S.J. at 16-17. The evidence in the record merely establishes that Southwall and Bostik jointly developed Heat Mirror sealant, *see* Tate Decl. Exhs. 20 at ¶ 2, 23 at ¶ 1, that Bostik told Southwall that temperatures at or above 160 degrees may cause some accelerated sealant degradation,

see Tate Decl. Exhs. 41 at ¶ 3, 42 at ¶ 1.4, 43, and that Bostik and Southwall jointly investigated purported sealant failures and the possible causes of those failures, *see* Tate Decl. Exhs. 25 at 2, 50 at ¶ 3. None of this evidence even suggests an agreement between Bostik and Southwall to participate in a wrongful act, namely to deliberately misrepresent the durability of the sealants at issue. Similarly, this evidence fails to suggest that Bostik and Southwall committed any wrongful acts in furtherance of the alleged conspiracy. Mere conclusory allegations are not sufficient to defeat summary judgment. *See Rivera v. National Railroad Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003). The Court cannot infer that Bostik conspired with Southwall because there are no facts from which such an inference reasonably could be drawn. *Maddux v. Philadelphia Life Ins. Co.*, 77 F. Supp. 2d 1123, 1133 (S.D. Cal. 1999) (granting summary judgment on Plaintiff's civil conspiracy claim when Defendants successfully demonstrated Plaintiff's inability to produce evidence of civil conspiracy); *see In re Software Toolworks, Inc. Sec. Litig.*, 1991 WL 319033, at *3 (N.D.Cal. June 17, 1991) (dismissing conspiracy claim where plaintiff failed to allege specific facts showing agreement to participate in unlawful act); *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1521 (N.D.Cal. 1990) ("It is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards this wrongful goal by virtue of a mutual understanding or agreement."). Therefore, Wasco has failed to demonstrate that a triable issue of fact exists as to whether the Defendants were engaged in a civil conspiracy that tolls the statute of limitations.

Because Wasco has not shown that there are genuine factual issues which can only be resolved by the trier of fact, the Court can determine the matter as one of law. Since Wasco's UCL claims accrued on October 6, 1997 with respect to the Heat Mirror sealants and in 1996 with respect to Bostik's conventional sealants, Wasco's UCL claims should have been filed by October 6, 2001 with respect to the Heat Mirror sealants and in 2000 with respect to Bostik's conventional sealants. Since neither equitable tolling of the statutory period, nor an estoppel applies, Wasco filed its complaint too late. Accordingly, the Court GRANTS Southwall's motion for summary judgment with respect to Wasco's UCL claims (Counts 5-7 of the TAC), and GRANTS Bostik's motion for summary judgment with respect to Wasco's UCL claims (Counts 5 & 7 of the TAC) and DENIES Wasco's motion for partial summary judgment with respect to Wasco's UCL claims against Southwall.

E. Other Arguments and Motions

Because the Court GRANTS Southwall's motion for summary judgment and GRANTS Bostik's motion for summary judgment and DENIES Wasco's motion for summary judgment for the reasons set forth above, the Court does not reach the other arguments presented in the parties' moving papers. Furthermore, since the Court grants Defendants' motions for summary judgment on all of Wasco's remaining claims, the Court DENIES as moot Wasco's Motion for Class Certification.[6]

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[6] The Defendants have also filed various evidentiary objections to declarations filed by Wasco in support of its moving papers and to Wasco's factual allegations in its moving papers themselves. The evidence objected to was not considered or relied upon by the Court.

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED THAT Defendant Southwall's Motion for Summary Judgment [Docket No. 268] and Defendant Bostik's Motion for Summary Judgment [Docket No. 306] is GRANTED.

IT IS FURTHER ORDERED THAT Plaintiff's Motion for Partial Summary Judgment [Docket No. 228] is DENIED.

IT IS FURTHER ORDERED THAT Plaintiff's Motion for Class Certification [Docket No. 233] is DENIED as moot.

IT IS SO ORDERED.

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

Dated: 12-18-03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WASCO PRODUCTS, INC.

Plaintiff,

v.

SOUTHWALL TECHNOLOGIES INC., and BOSTIK, INC.,

Defendants.

No. C 02-2926 SBA

JUDGMENT

(Filed Dec. 22, 2003)

In accordance with the Court's Order Granting Defendants' Motions for Summary Judgment,

IT IS HEREBY ORDERED THAT final judgment is entered in favor of Defendants on all of Plaintiff's claims for relief. All matters calendared in this action are VACATED. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

DATED: 12-19-03 /s/ S B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASCO PRODUCTS, INC. Plaintiff-Appellant, v. SOUTHWALL TECHNOLOGIES INC.; BOSTIK, INC., Defendants-Appellees.	No. 04-15171 D.C. No. CV-02-02926-SBA Northern District of California, Oakland ORDER (Filed Feb. 27, 2006)

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Judge Rymer voted to deny the Petition for Rehearing En Banc, and Judge Wallace and Judge Trott so recommend.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WASCO PRODUCTS, INC. Plaintiff v. SOUTHWALL TECHNOLOGIES, INC. and BOSTIK, INC., Defendants.	NO. C-02-2926 SBA (And Related Case Nos. C-97-3701, C-00-3820) **THIRD AMENDED COMPLAINT FOR DAMAGES** **DEMAND FOR JURY TRIAL** (Filed Jun. 27, 2003)

JURISDICTION AND VENUE

1. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332 in that this is a civil action between citizens of different states and concerns an amount in controversy in excess of $75,000 exclusive of interest and costs.

2. Plaintiff WASCO PRODUCTS, INC. (hereinafter "Wasco") is a corporation organized under the laws of the State of Maine with its principal place of business in Sanford, Maine.

3. Defendant SOUTHWALL TECHNOLOGIES, INC. ("Southwall") is incorporated under the laws of the State of California, with its principal place of business at 1029 Corporate Way, Palo Alto, California.

4. Defendant BOSTIK-FINDLEY, INC., ("Bostik") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business at 11320 Wauwatosa, Wisconsin. In the Fall of 2000, Bostik, Inc. of Middleton, Massachusetts, merged with ATO Findley, Inc., integrating their two organizations to become Bostik-Findley, Inc. The merger created a worldwide company of 4,500 employees with production facilities and sales operations in 36 countries across five continents, and whose parent company, TotalFina-Elf, is a $73 billion multi-national company with extensive worldwide interests in oil exploration, petroleum refinery and specialty chemicals. (See Exhibit A.)

5. Venue is proper pursuant to 28 U.S.C. §1391, as defendant Southwall is incorporated under the laws of the State of California with its principal place of business in Palo Alto, California. Furthermore, plaintiff is informed and believes and based thereon alleges that all defendants have purposely availed themselves of the benefit and protections of the State of California and/or have had sufficient contact with this District such that the maintenance of this action is consistent with the principles of due process.

INTRADISTRICT ASSIGNMENT

6. Defendant Southwall is incorporated under the laws of the State of California with its principal place of business in Palo Alto, California. Pursuant to Local Rules

3-5(b) and 3-2(c), assignment of this case is appropriate in either the San Francisco or Oakland Divisions.

NATURE OF THE CASE

7. This is a class action on behalf of all individuals, proprietorships, partnerships, corporations, and other business and legal entities in the United States who utilized Bostik polyurethane sealants including Bostik 3190 HM Sealant in the manufacture of Heat Mirror Insulating Glass between 1989 and 1999 and the purchase and resale of insulating glass which was in turn sold as skylights or windows. This is a nationwide class action against Defendants' Southwall and Bostik on Plaintiffs' claim for fraud, concealment, negligence and unfair business practices. The class area includes the geographic limits of the fifty (50) states comprising the United States of America and the District of Columbia.

FACTS COMMON TO ALL CAUSES OF ACTION

The Development Of Heat Mirror

8. In the 1970s and early 1980s engineers developed the process for the manufacture of Heat Mirror, a film which allows a transmission of a high percentage of the visible solar spectrum but which reflects less desirable (non-visible) portions of the solar spectrum (such as "near infrared" light – heat.). The engineers developed a sputter coating process by which extremely thin layers of metal including a middle layer of silver were deposited on a Polyethyleneteraphalate film ("PET"). The metals layers were sufficiently thin that a high percentage of visible light passed through the film. One of the first, if not the first film, was Heat Mirror 88 which was so designated

because it purportedly reflected large amounts of near infrared and ultraviolet light and yet allowed close to 88% of the visible light spectrum to pass through. Ultimately, films ranging from HM 88 down to HM 22 (22% visible light transmitted) were developed.

9. By 1981 the engineers developed an application for the film: residential and commercial windows. Standard "insulated glass units," ("IGUs") often referred to as a "dual pane" windows, are comprised of two pieces of glass ("lites") separated by a spacer material which trace the perimeter of the glass panes. In Heat Mirror IGUs, the Heat Mirror film is suspended between *two* metal spacer bars which follow the perimeter of the glass. In essence, the Heat Mirror IGU is a sandwich: the top and bottom are lites of glass. In between are two metal spacer bars with the film stretched in between them. The unit is held together by insulating glass sealant which also hermetically seals the IGU and prevents moisture from intruding into the airspace. The Heat Mirror IGUs are heated to approximately 200°F for approximately one hour, during which the film contracts and as a result becomes nearly invisible to the untrained eye. These IGUs are then inserted or "captured" in window frames or skylights made of aluminum, vinyl or wood and later installed in residences or commercial buildings.

10. In the market of insulating glass, these Heat Mirror units are rather complex IGUs. They are expensive high performance windows that sell in the "Superwindow" category. They have been described by Southwall representatives as the "Mercedes Benz" and "Cadillacs" of window world. According to Southwall promotional materials, Heat Mirror has such a significant ability to reflect heat that it allows for reduced loads for HVAC equipment

even where additional glass is used in high-end homes and commercial settings.

11. The manufacturing process for Heat Mirror IGUs is set forth, step-by-step, in the "Heat Mirror Manual" authored by Southwall. Various versions of which were given to Heat Mirror manufacturers over the years. The entire manufacturing process, beginning with the purchase of materials for fabrication and ending with the inspection of the manufactured Heat Mirror Insulated Glass Unit is set forth in The Heat Mirror Manual. Accordingly, the entire process and materials used are strictly prescribed and specified by Southwall Technologies.

12. On or about 1988, Southwall entered into written Value Added Reseller Agreements ("VAR"), with the various Heat Mirror manufacturers. The VAR was a license issued by Southwall requiring the Heat Mirror manufacturers to observe, the conditions of manufacture as required by Southwall.

Heat Mirror Insulating Glass Sealants

13. When Southwall engineers first developed the concept of Heat Mirror Insulating Glass, Southwall and the Heat Mirror Manual itself specified a polysulfide insulating glass sealant. Polysulfide sealants have had a long history in sealing insulating glass and at the time were recognized to yield an average seal lifetime of in excess of 25 years. In his July, 1990, article in Glass Magazine, Joe Amstock, Bostik's former Product Manager for insulating glass sealants, recognized that polysufides [sic] not only had a lifetime of 25 years but also a service temperature range from -20° Fahrenheit ("F") to 200°F. (See Exhibit B, p. 66.) Polysulfide sealant does not, however,

possess sufficient rigidity to grip the Heat Mirror film as the film contracts during the curing process when the IGUs are heated to approximately 200°F. Polysulfides could not meet Southwall's imposed standards for resistance to pull in or "creep" 0.007" Max. Because of this, manufacturers utilizing polysulfide sealants were required to glue the film to the spacer bars by applying a thin bead of Armstrong 031 epoxy prior to the application of the sealant and the film tensioning process.

14. In the early 1980s Southwall studied various IGU configurations to determine "moisture vapor transmission" of sealants in standard IGUs and Heat Mirror IGUs, concluding that: (1) standard IG dual seal is about three times as good as Heat Mirror dual seal units; (2) standard IG single seal is about two times as good as Heat Mirror single seal units; (3) film flapping (sic) (causing sealant void) is seven times more permeable than 100% fill; and (4) putting a film between two spacers triples the moisture intrusion rate in the middle. (See Exhibit C.)

Bostik 3180 and 3180HM Sealant

15. Prior to its ventures with Southwall, Bostik manufactured a polyurethane sealant (3180) for use in manufacturing standard insulating glass units. (See Exhibit D.) Bostik so successfully dominated the polyurethane sealant market for insulating glass that the term "polyurethane" meant Bostik polyurethane insulating glass sealant.

16. Using the Bostik 3180 formula as a starting point, Southwall and Bostik jointly set upon a course to develop a higher modulus polyurethane sealant which would resist creep and hold the film firmly without the

need for the epoxy as required when polysulfide sealant was used. (See Exhibit E.) Southwall employees such as Steve Vincent, traveled from California east to Huntington Valley, Pennsylvania, and spent considerable time working in the Bostik facility in order to develop the sealant. The purpose of the joint venture was to increase manufacturability of Heat Mirror IGUs to sell more of Southwall's Heat Mirror film and more of Bostik's Heat Mirror sealant. Southwall and Bostik worked on behalf of each other and as the agent of each other in furthering this common agenda. Bostik and Southwall both profited from the joint venture.

17. As a result of the joint efforts, Bostik successfully qualified, and Southwall approved 3180 HM sealant in a dual-seal application in early 1984 and a single seal application in 1985. This test qualification was incorporated in every version of the Southwall Heat Mirror Manual.

18. This successful development of the "HM" sealant had the benefit of making the manufacturing process more user friendly reducing manufacturing costs and, hence, increasing sales of Southwall film and Bostik sealant. This ease of manufacture generated increased film sales for Southwall.

19. In a dual-seal configuration primary, a sealant such as a polyisobutylene is added to the secondary sealant (commonly either polysulfide, polyurethane or silicone) to discourage moisture vapor transmission and add protection from ultraviolet radiation. A single seal is generally preferred because of the reduced labor required and the corresponding reduced opportunity for error in application. In 1985, Bostik 3180 HM was qualified for use

in Heat Mirror insulating glass in a single seal application which was desirable because single seal was easier and cheaper to produce at that time.

20. In Chapter 4 of the Heat Mirror Manual: Unit Fabrication, subsection 4.2, entitled Approved Materials, Southwall designated Bostik 3180 HM and later 3190 HM polyurethane sealant to be used in the Heat Mirror manufacturing process. At section 4.3.1 of the Manual, Southwall vouched for the Bostik sealant stating during the relevant time period:

> The sealants approved for use in manufacturing Heat Mirror IG have passed extensive Southwall testing. *See* technical bulletin HMIG-03. (See, e.g., Exhibit F.)

Bostik's Misleading Marketing

21. In order to further promote the acceptance of Bostik polyurethane sealant in the insulating glass industry, during the 1980s, Bostik embarked upon a concerted campaign of fraudulent overstatements regarding the capabilities of Bostik's polyurethanes. For instance, in 1984, Joseph Amstock and John Duffy of Bostik published and presented a paper claiming Bostik polyurethane sealant had the ability to bind over contaminants on raw glass and other components (such as spacers) used in the IGU manufacturing process thereby giving manufacturers greater flexibility and a margin for error with regard to the cleanliness of the glass used to manufacture insulating glass units. (Exhibit G.) In truth, Bostik representatives never qualified these claims under any controlled testing. Bostik had never done anything more than apply random qualities to various materials found within its facility. This

claim was continually repeated for polyurethanes as late as 1997 when Joseph Amstock, the former product manager and respected sealant expert at Bostik, restated it at pp. 188, 189, in his book entitled "Glass in the Construction Industry":

> Another interesting property of polyurethane insulating glass sealant is its ability to bond to contaminated surfaces in laboratory tests, urethane has been applied to glass and spacers treated with contaminants including hand grease, silicone spray, and cutling [sic] oils. The urethane bonds through most of these materials. This property gives the insulating glass manufacturer a safety margin in sealant adhesion. (See Exhibit H.)

Bostik intended these representations to have the widest dissemination in the market to induce manufacturers to use Bostik polyurethane sealants and distributors to purchase and distribute products containing them.

22. Bostik also claimed its sealants could safely operate in environments ranging from -40°F to 200°F. Bostik repeatedly published and distributed Technical Data Specification Sheets for its polyurethane sealant which states the sealants had a "service temperature range" of -40°F to 200°F. (See Exhibits D and I) Bostik never published or distributed a data specification sheet for Bostik polyurethane insulating glass sealant which did not make this representation. Mr. Amstock, identified as "the Business Manager for sealants for Bostik, Inc." published this claim in his July, 1990 Glass Magazine. (See Exhibit B, p. 70.) Again, this representation was never verified by laboratory or field testing. Bostik intended these representations to have the widest dissemination in the market to

induce manufacturers to use Bostik polyurethane sealants and distributors to purchase and distribute products containing them.

23. Utilizing the foregoing misleading representations and recognizing that it could use its "exclusive" market for the sale of its "Heat Mirror" sealant, Bostik convinced manufacturers who had switched from polysulfide sealant to the Bostik 3190 HM sealant to switch their "non-Heat Mirror" IGU operations to Bostik polyurethane sealants as well. Bostik successfully switched a number of manufacturers, such as Northwest Aluminum, Hurd Millwork and Ultra Glass, over to its conventional grade polyurethane in this way.

Bostik 3190 HM Sealant

24. Prior to 1989 defendant Bostik manufactured 3180 HM as the "exclusive" or only polyurethane insulating sealant approved by Southwall for use in manufacturing Heat Mirror IGUs.

25. Although Bostik 3180 HM deleted the need for the use of epoxy to glue the film to the spacers to prevent creep, it contained undesirable metal materials such as mercury. During the late 1980s manufacturers of Heat Mirror IGUs noticed dark lines forming on the Heat Mirror film contained within the IGUs. The dark lines, alternatively referred to as "Tiger Tails" or "Spiderwebs," formed as a result of the mercury "volitalizing" or "outgassing" from the 3180 HM sealant and reacting with the silver contained within the coating on the various Heat Mirror films. Southwall's Board of Directors recognized that these dark line problems would destroy the market for Heat Mirror and made the solution of the problem a

top priority at Southwall. This issue was discussed at the highest levels of the company including an April 29, 1988, Board of Directors presentation by then-President Bruce J. Alexander.

26. Although the cause of the Tiger Tail problem was not disclosed to the Heat Mirror IGU fabricators and distributors, Southwall threatened Bostik that if Bostik could not develop a mercury-free Heat Mirror polyurethane sealant, Southwall would open up what had been an exclusive polyurethane Heat Mirror sealant market and allow other manufacturers such as H.B. Fuller and Tremco to qualify polyurethane sealants for use in the Heat Mirror manufacturing process. (See Exhibit J.)

27. As a result of Southwall's indication that it would open up Bostik's exclusive market, in 1989 Southwall and Bostik jointly embarked on an expedited, aggressive campaign to redesign the sealant in a mercury-free edition. Bostik designed and sent to market a "mercury free" 3190 HM sealant without any long-term field testing. Although the mercury deletion and catalyst change was a significant change according to Bostik chemist Roger Alvarez, Richard Owens and others at Bostik took the position that the deletion of the mercury from the sealant catalyst was only a "minor" change. Therefore, Southwall and Bostik "grandfathered" in the sealant as an "approved sealant" without the "extensive" testing represented by Southwall in the Heat Mirror Manual supplied to all manufacturers.

28. The Technical Data Sheets for 3190 HM sealant identifies the purpose of 3190 HM as solely related to use in Heat Mirror IGUs. (Exhibit I.) It is not to be used for other window fabrication; it has no other application.

Accordingly, because it fails to adequately seal Heat Mirror IGUs, Bostik 3190 HM sealant is not fit for the only purpose for which it is sold: sealing Heat Mirror Insulating Glass Units.

29. From the date of development of 3190 HM in 1989 until at least January of 1999, the Technical Data Sheet for Bostik 3190 HM sealant provided that the sealant had a "Service Temperature Range" of minus 40°F to 200°F. Since, according to John Duffy, who was responsible for testing the sealant and its predecessor 3180 HM sealant, the 3190 HM sealant was successfully tested only to a high temperature of 140°F in an IGU configuration, it was never successfully tested to temperatures of 160°F or above, Bostik's representations regarding the "service temperature range" are and were false.

30. Because the Heat Mirror film must be shrunk for no more than an hour at high temperature (205°F to 215°F), the sealant used in Heat Mirror IGUs must have a high modulus to maintain its resistance to creep holding the film taut as the film itself biaxilly contracts. As a result, a "higher modulus" sealant such as 3190 HM is by definition less flexible or pliable than the sealants used in ordinary dual pane windows. This condition leads to a shorter life expectancy for the insulated glass unit.

31. As part of its concerted efforts to market its polyurethane sealants, Bostik's polyurethane product manager at the time, Joe Amstock, published a detailed comparison of polyurethane and polysulfide sealants in an attempt *inter alia* to improve the market share for Bostik's polyurethane sealant at the expense of the generally accepted standard polysulfide in the July 1990 issue of Glass Magazine – the definitive journal of technical issues

for the insulating glass industry. Amstock knew that polysulfides had an accepted ability to operate in environments with high temperatures reaching 200°F. Knowing Bostik could not make inroads into the polysulfide market without marketing the accepted polysulfide service temperature range of up to 200°F, Bostik created such a service temperature range by simply including one in every specification ever written for Bostik polyurethane. Bostik devoted sufficient resources that this misrepresentation became so widespread and repeated so often by Bostik representatives and others, that it became accepted by the entire insulating glass industry. As John Duffy later admitted, at no time during the 1980s and 1990s had Bostik successfully established a Service Temperature Range above 140°F.

Southwall Sells Wasco On Heat Mirror With Bostik HM Sealant

32. In the 1980s, Wasco staff undertook an effort to identify a high performance insulating glass unit to improve the performance of its skylights and enhance Wasco sales. Wasco studied several options, including Low-e glass, Heat Mirror IGU, a competitor film known as Sungate, and others. Southwall, on behalf of itself and Bostik, made a number of presentations to Wasco stressing the durability of Heat Mirror IGU sealed with Bostik polyurethane and the appropriateness of Heat Mirror 66 for use in Wasco skylights an application which by design generates temperatures in excess of 160°F.

33. On a number of occasions including but not limited to the National Homebuilder's Trade Show held between January 16 and January 19, 1987, at the Dallas

Convention Center in Dallas, Texas, Alex Tennant, Southwall's Vice President in charge of Sales and Marketing met with Wasco's Robert ("Bob") Sampson and discussed the benefits of Heat Mirror insulating glass. Tennant attempted to convince Sampson that Wasco should not only incorporate and sell Heat Mirror in Wasco skylights but that Wasco should manufacture Heat Mirror insulating glass units itself. During the discussions with Sampson, Tennant assured Sampson Heat Mirror insulating glass was absolutely appropriate for use in overhead applications like Wasco's skylights. He also told Sampson that all of the component parts including the sealants utilized in Heat Mirror technology had been "extensively" tested.

34. In furtherance of the parties' discussions, a meeting was arranged to allow Southwall to make a formal presentation regarding Heat Mirror technology and answer other questions from Wasco representatives. On March 30, 1987, Bob Sampson sent an agenda to Alex Tennant for a scheduled April 3, 1987 meeting between Wasco and Southwall representatives to continue discussions regarding the possible use of Heat Mirror insulating glass in Wasco skylights. (See Exhibit. K.) Bob Sampson, Sean Flannigan, Estelle Gore, and others from Wasco attended the meeting with Southwall's East Coast sales representative Scott Creason. At the meeting, the parties reviewed the items laid out in Bob Sampson's proposed agenda and other materials supplied by Mr. Creason including articles on gas retention in insulated glass, gas filling in insulated glass, a review of gas filled window technology, various Heat Mirror related materials including the following: incremental costs of making Heat Mirror insulating glass – single seal for polyurethane, a Heat Mirror price sheet, a Heat Mirror supplies price list, a

Southwall Technologies' Heat Mirror program – production startup primer, a listing of Heat Mirror insulating glass authorized manufacturers, a number of gas-fill insulating glass related and heat transfer articles and an excerpt of the Heat Mirror Manual, identifying, among other things, Bostik 3180 HM sealant as a Southwall approved sealant for use in the manufacture of Heat Mirror insulated glass. (Exhibit L.) Additionally, Creason prepared and presented handwritten materials concerning: Heat Mirror Glazing options, Heat Mirror Shading co-efficients, Heat Mirror Ultraviolet transmission and Heat Mirror equipment costs and setup.

35. During discussion at the April 3, 1987 meeting (and other meetings as well), the Wasco representatives inquired as to the appropriateness of the sealant and other component parts utilized in Heat Mirror IGU and their use in Wasco skylights. At the April, 1987 presentation, Scott Creason stated to Bob Sampson, Sean Flannigan, Estelle Gore, and others that Heat Mirror insulating glass was appropriate for Wasco skylights and assured them that the insulating glass sealants used in the Heat Mirror manufacturing process, including the Bostik polyurethane sealant, had passed "extensive testing" prior to being approved by Southwall. Southwall representatives repeated these representations at numerous presentations to Wasco in Sanford, Maine and elsewhere – such as Wasco's 1989 National Sales meeting in Atlanta, Georgia. Neither Bostik nor Southwall ever advised Wasco that any of sealants approved for use in manufacturing Heat Mirror IGU's were *not* extensively tested.

36. Based upon these representations, Wasco decided to market Heat Mirror IGU exclusively as part of the launch of E Class Skylight and, while initially deferring to

purchase the machinery to manufacture of its own Heat Mirror IGUs, Wasco began buying Heat Mirror from Ultra Glass, a manufacturer recommended by Southwall.

37. Although Wasco did not begin to purchase Bostik's Heat Mirror or "HM" polyurethane, Bostik was able to use its marketing strategy and convince Wasco that its polyurethane sealants were appropriate for Wasco standard skylights and overhead or sloped glazing applications. Accordingly, in February, 1991, Wasco began purchasing Bostik standard grade 3190 polyurethane for use in insulating glass manufacturing process.

Four Seasons Failures

38. In late 1989 and early 1990, Four Seasons Solar Solariums, a manufacturer of solariums and greenhouses utilizing Heat Mirror 44 and 66 IGU, began reporting elevated failure rates in the Heat Mirror Units it manufactured, units which were primarily designed for southern and overhead (*e.g.*, skylight, greenhouse roof) exposures. (Wasco purchased HM66 units for use in its residential skylights.) Four Seasons complained to both Southwall and Bostik about the failures. Although Defendants were able to document a number of failures which resulted from improper glazing which exposed sealant to direct solar radiation, both Southwall and Bostik located properly glazed units which did not yield direct u.v. exposure but which nevertheless suffered u.v. burn and prematurely failed from indirect u.v. exposure, elevated temperatures or both. In the early 1990s Bostik noted that properly glazed and installed windows had suffered from u.v. burn in various locations throughout the U.S., including Iowa and Florida. Southwall's Scott

Creason, in charge of the Southwall field investigation, identified many failed units in the Midwest. Southwall's employee Peter Millar also investigated and noted the "u.v. burn" failures which could not be explained except by what Millar termed "some kind of thermo-mechanical and/or hydrolytic mechanism." When Hurd Millwork reported similar claims in the Southeastern part of the United States, Southwall misled Hurd representatives telling them the failures were the result of its use of polysulfide sealant on its 1980s vintage units. When Northwest Aluminum suffered failures, Bostik told Northwest its failures resulted from contamination on its glass even though the same glass and glass washing systems did not result in failures of Northwest Low-e and standard insulating glass units.

39. Southwall recognized Four Seasons' complaints had viability and explained the effect of indirect u.v. piping to representatives of Four Seasons in early 1990 at a meeting attended by Tom Hood, Alex Tennant and Scott Creason. Southwall also explained that Four Seasons could lengthen the life of its units by wrapping the perimeter of the IGUs covering the sealant with a tape already required by Southwall to be used when manufacturing Southwall's patented "Superglass Heat Mirror IG." Southwall agreed to compensate Four Seasons and worked out the complicated credit system set forth as Exhibit M. Bostik denied any culpability telling Four Seasons its failures were solely attributable to poor manufacturing and/or installation.

Indirect Ultraviolet Exposure

40. In 1990 and again in 1991 Southwall engineers studied the effect of indirect ultraviolet exposure and demonstrated that ultraviolet light can indeed travel the outer panes of glass (much like fiber optic cables) to the outer edges and reach the sealant. For instance, in a March 19, 1990, Southwall Report authored by Southwall Engineer F. Eugene "Gene" Woodard, Woodard recognizes that even in properly glazed units, "substantial" amounts of light reach the "hidden sealant." The Heat Mirror problem was so significant that a task force was formed to study both the seal failure problem as well as a related film cracking problem. The Heat Mirror Durability Committee consisted of Tom Hood, Roger Iles, Gene Woodard, John Pagendarm and others. By March, 1990, it was reported to the Board of Directors that the committee had found "1. Evidence of Premature Polyurethane Failure in all Heat Mirror Insulating Glass." (Exhibit N) The committee studied various failure sites identifying the type of film involved, orientation of glass and whether the sealant had coverage from direct exposure. Prior to the cancellation of the investigation, the committee had identified 23 sites, 21 of which had no indication of direct sealant exposure. Southwall representatives told no one except Bostik representatives.

41. Based upon the March 19, 1990, study and the committee's research, Dr. Woodard and Thomas G. Hood, Southwall's current President and CEO, developed a remedy for the problem and thereafter applied for a patent seeking the rights to the use of "Seal Guard Edge Tape", a u.v. absorbing tape. The patent which was granted in 1993 relates to the application of the u.v. absorbing tape to the outside edge of IGUs to prevent injury caused by u.v.

piping. In the patent application, Messrs. Hood and Woodard recognize that in a Heat Mirror IGU, additional u.v. light travels into the sealant as a result of reflection off the Heat Mirror film.

42. Bostik also knew that indirect solar exposure would cause premature sealant failure in insulated glass units. Joe Amstock, Bostik's former Director of Marketing for IGU Sealants, and John Duffy, supervising engineer for insulating glass sealants, also knew that u.v. light travels through glass toward the outside edge of the window and into the sealant, thereby causing the sealant to degrade. This phenomenon was known at Bostik as u.v. "tunneling."

43. In Amstock's 1997 book, Glass In The Construction Industry, Amstock and Dr. Bernard Lowe wrote, "In addition to the possibility of direct exposure, it has been calculated that "38 percent of incidental ultraviolet rays reach the adhesive interface of the secondary sealant in an insulating glass unit by reflection, even if it is protected by a coating. This leads to a direct attack on the adhesive interface of the secondary sealant itself." Amstock agreed with this analysis and at all times relevant here understood that even indirect light striking an organic polyurethane sealant (i.e. Bostik 3180 HM or 3190 HM) causes "u.v., Burn," a condition of premature aging.

44. Studies concerning u.v. tunneling or piping and the result of indirect u.v. exposure to the sealant and elevated temperatures were thoroughly discussed by John Duffy and other Bostik representatives with Steve Vincent, (Southwall's Head of Testing at the time) in February of 1990. Southwall had designated Vincent and Bostik had designated Duffy exclusively for communications of this type during the investigation. These gentlemen compared

resistance of polysulfide and polyurethanes to ultraviolet light exposure, the weaknesses associated with organic sealants when compared to Silicone Sealants. Representatives of either Bostik or Southwall never communicated these facts to any Heat Mirror IGU manufacturer at any time.

45. During all times relevant here, Southwall and Bostik knew that exposure to solar radiation including ultraviolet light particularly at elevated temperatures, degrades organic sealants such as Bostik 3190 HM. It is a general rule of thumb that oxidative reactions, like other chemical reactions, double as temperature is increased by 10°C. Both Bostik and Southwall also knew, that even the indirect ultraviolet exposure (i.e., sunlight reflected or refracted through the glass and/or reflected off Heat Mirror films and into the sealant) would cause premature sealant degradation. Defendants knew, or should have known, that the Bostik, organic sealant would probably degrade in units installed in moderate environments. In other words, even Heat Mirror units properly manufactured pursuant to the steps set forth in the Heat Mirror Manual and properly installed, would not last the expected 30 year lifetime as recognized by current Southwall President, Thomas G. Hood.

46. Although both Southwall and Bostik engineers recognized that u.v. piping was occurring and could damage the organic Bostik polyurethane sealant in a Heat Mirror IGU, Bill Gomm, Southwall's National Service Representative and liaison to the various Heat Mirror IGU manufacturers, was not told of the significance of the phenomenon. Similarly, Louis Lau, who serviced Heat Mirror manufacturers in the Far East, was kept in the dark. Accordingly, neither ever told any of the Heat Mirror

manufacturers to use the Seal Guard Edge Tape or to take other steps to protect against the indirect u.v. degradation.

Bostik's 3190 HM U.V. Enhanced (3199)

47. In order to address the problem posed by the defective 3190 HM sealant, Bostik released a new variation of the sealant almost immediately after developing 3190 HM. The new sealant contained an additional compound to combat the effects of a high solar environment and high temperatures produced in Heat Mirror IG. This new sealant was originally named "3190 HM U.V. Enhanced." The testing of 3190 HM U.V. Enhanced began in March of 1990. According to Bostik, this product (eventually renumbered 3199) had a superior ability to withstand the indirect u.v. exposure and heat as well as exposure to free water. As the report sets forth on p. 1, while "3190 U.V. enhanced" performs well under ultraviolet exposure, 3190 HM becomes "embrittled" (hard and cracked). (Exhibit O.) The addition of the enhancement compound was originally suggested to Bostik prior to formulating its 3180, 3180 HM 3190 and 3190 HM sealants, but was rejected by Bostik in order to save costs.

48. Bostik had previously added this compound to its sealant manufactured in Europe and found the addition had the startling result in that the sealant "lasted 20 times longer before crazing appeared," a fact Bostik's Duffy related to Southwall on March 5, 1990. (Exhibit P.)

49. Both Southwall and Bostik knew 3190 HM was deficient. Both Defendants knew that a change to 3190 HM U.V. Enhanced (3199) and the addition of a strip of u.v. absorbing Seal Guard Edge Tape developed to absorb u.v. were necessary for Heat Mirror units to survive long

term in the field. On August 10, 1990, Southwall's current president Thomas G. Hood wrote to Richard Owens and Joe Amstock at Bostik memorializing this understanding:

> Please find enclosed Southwall's . . . announcement of our new Seal Guard Edge Tape . . . The qualification and adoption of Bostik's 3190 u.v. – enhanced polyurethane is the second and necessary step which we must take to ensure an acceptable product lifetime.

(Exhibit Q.) Mr. Hood never communicated these comments to the manufacturers or distributors of Heat Mirror insulating glass.

Failures Due To Elevated Temperatures – Heat

50. In addition to the degradation associated with direct and indirect solar radiation, elevated temperatures such as those experienced within Heat Mirror IGU, also cause organic sealants to fail. Defendants have continued to deny that the design of the Heat Mirror IGU increases heat and, therefore, stress on organic sealants such as Bostik 3190 HM.

51. Although Bostik never related the effects of increased heat as a possible cause of premature insulating glass sealant failure to the various manufacturers, Bostik employee John Duffy discussed this issue with representatives of Southwall, including Southwall's Head of Testing, Roger Iles, in the early 1990s. In one conversation occurring on September 23, 1991, memorialized in a memo authored by Dr. Iles, Dr. Iles summarizes John Duffy's opinions regarding heat and polyurethanes:

> . . . The primary effect of increased temperature would be on a bulk property such as hardness . . .

> A 40°F increase in temperature shortens life [of sealant] by about 60%, i.e., to 40% of original life.
>
> Since 3190 HM already has a higher modulus than typical sealants, an increase in hardness would tend to further decrease the ability to cope with edge interface stresses and in this way lead to adhesion failure.

Duffy estimated that as a result of elevated temperatures, 3190 HM sealed Heat Mirror IGUs would last only 8-10 years. (Exhibit R.)

52. Although Bostik tests its sealants only pursuant to ASTM E773/774, a standard exposing units to temperatures of only 60°C (Centigrade) or 140°F in a laboratory setting, since at least 1985, Bostik has represented in specification sheets and industry journals and papers that the temperature service range for all of its polyurethane sealants including 3180, 3190, 3190S, as well as the Bostik Heat Mirror Sealants (3180 HM, 3190 HM) is from -40°F to *200°F*. (Exhibits D and I.)

53. Although Bostik represented to the general public that its sealants could all perform to temperatures of 200°F, Bostik always informed Southwall that its sealants were only tested to 140°F. (See Exhibit S.) Despite Southwall's desire that the sealant perform to temperatures of 160°F, Bostik made no formula changes which would account for an improvement in the service temperature range for its polyurethane sealants.

54. Southwall and Bostik have jointly tested the sealant for its ability to resist failure (measured in terms of "creep"). Bostik sealants tested above 160°F for up to 10 hours fail. On December 14, 1990, Southwall produced testing results that, as Mr. Louis Lau (Southwall engineer)

writes, "unfortunately" demonstrate that after only one (1) hour of exposure to sunlight at 107°F the sealant reached 208°F. It was clear to both Southwall and Bostik that the elevated temperatures reached inside Heat Mirror IGUs would cause problems.

55. Bostik failed to test windows, constructed with or without Heat Mirror film, to determine the temperatures reached inside prior to identifying service temperature rages [sic] for any of its polyurethane sealants. Accordingly, although Bostik's Director of Research and Development Duffy agrees that knowledge of the temperatures experienced inside an IGU would be important information for the design of insulating glass sealant, he never knew what those temperatures were either before, or after, selling thousands of gallons of Bostik 3190 HM to be used solely for the manufacture of Heat Mirror windows.

56. As set forth above, both Bostik and Southwall's testing clearly demonstrates that Bostik sealant was not acceptable to service where temperatures exceeded 160°F. Bostik knew that its 3190 HM sealant could not perform as was represented.

57. During the early 1990s and approximately six years after Bostik first introduced its Heat Mirror polyurethane insulating glass sealant and represented that it effectively sealed lites of glass in Heat Mirror insulating glass with a service temperature range between -40°F and 200°F; and, at least one year after introducing 3190 HM sealant, Bostik and Southwall embarked on a series of tests to determine the temperatures to which Heat Mirror insulating glass sealant would be exposed and the effect of temperatures in excess of 140°F inside the IGUs in an

attempt to determine the life expectancy of the sealants used in Heat Mirror insulating glass.

58. Bostik representatives were told that representatives of Guardian Glass had determined that temperatures inside insulating glass units reached in excess of 200°F. (Exhibit T, § 1.4.) Southwall itself determined that the Gibson home Heat Mirror installation in Blackhawk, California, units prematurely failed solely as a result of the temperatures experienced in Blackhawk, California (Exhibit U.)

59. Representatives of Southwall and Bostik jointly investigated the effect of increased temperatures on the seal capability of insulating glass units such as Heat Mirror insulating glass concluding that the interior temperatures could well exceed the limits that could be tolerated by the Bostik polyurethane sealant whether it be 3180 HM or 3190 HM. Consistent with its indifference to the realities of temperature induced seal failures, Southwall advertised the Heat Mirror installation at the Gibson home in Blackhawk, California. (Exhibit V.) Although Southwall and Bostik knew that the elevated temperatures caused undisclosed risk to the manufacturers of Heat Mirror insulating glass, neither Southwall nor Bostik informed representatives of Wasco or any Heat Mirror manufacturer, so that Wasco, or others, could make an informed decision whether to discontinue or continue the manufacture of Heat Mirror insulating glass and expose itself to millions of dollars of warranty claims or to continue the manufacture of Heat Mirror with an alternate sealant system, perhaps utilizing the perimeter barrier tape as an added safeguard.

60. As a result Wasco and others continued to manufacture and/or market and warranty the durability and performance of Heat Mirror insulating glass. Wasco and others manufactured and/or sold approximately $2.3 billion of Heat Mirror insulating glass. Bostik and Southwall had reason to know that substantially all of this Wasco Heat Mirror insulating glass would fail prematurely. Despite this knowledge, neither representatives of Bostik nor representatives of Southwall ever warned Wasco (or others) concerning this risk. To do so would cause Wasco (and others) to take more elaborate, and therefore more expensive, methods of manufacture, which was a disincentive to sell the more expensive Heat Mirror insulating glass when compared with its chief competitor, Low-e glass products. If manufacturers and/or distributors had known of the limitations, they could have taken additional steps, such as wrapping in each unit with perimeter barrier tape to lengthen the lifetime of Heat Mirror units sold or they could have chosen to modify the warranties given with finished produce or discontinue the sale of Heat Mirror IGU altogether.

61. Although Bostik had an exclusive franchise on Heat Mirror sealant, it did not have an exclusive. franchise on sealant used in Low-e glass. It had no economic reason to point out the shortcomings of the Bostik sealant. Moreover, since nearly all of the Southwall manufacturers had switched from polysulfide to polyurethane, Bostik had leverage over Southwall.

62. Southwall had created, patented and manufactured Heat Mirror film and licensed the system for utilizing Heat Mirror film in the manufacture of Heat Mirror insulating glass. It had no reason to draw manufacturers' attention to the shortcomings of the system, or warn them

of the more elaborate steps needed to produce effective and durable insulated glass. To the contrary, Southwall embarked upon a campaign to increase the number of Heat Mirror manufacturers and, hence, sale of Heat Mirror film and Bostik sealant.

63. Bostik continually represented to the insulating glass industry that Bostik polyurethane sealant including Heat Mirror IGU manufacturers that the 3190 HM sealant was superior to polysulfide sealant for sealing Heat Mirror IGU. At the urging of defendant Bostik and Southwall, almost every manufacturer switched from polysulfide to the Bostik polyurethane.

By 1989 or 1990 Ultra Glass, the Heat Mirror manufacturer who first supplied Heat Mirror to Wasco had switched from the Bostik 3180 HM to the new 3190 HM. At that time, the specification sheet provided by Bostik for the 3190 HM to plaintiff describes Bostik 3190 HM as a "two-component Heat Mirror Grade polyurethane sealant developed especially for sealing of insulating glass units of Heat Mirror construction. Bostik 3190 HM possesses superior adhesion to glass, metal, Heat Mirror film and plastics." Its use was described as follows:

> Bostik 3190 HM can be used to effectively seal lites [panes] of insulating glass constructed with Heat Mirror transparent insulation.
>
> Bostik 3190 HM is not recommended for use in standard (non-Heat Mirror) insulating glass construction. (See Exhibit J to the Complaint.)

The specification sheet at all times indicated the sealant had passed all three testing periods (CBA) of ASTM E774-81 Method E773-81. (See Exhibits D and H to Second Amended Complaint.)

64. Bostik representatives repeatedly informed manufacturers that polyurethanes such as 3190 HM were superior to polysulfide sealant "for MVT (moisture vapor transmission)" and were physically stronger. Bostik representatives, however, never disclosed that it had investigated unexplained sealant failures in Iowa, Florida, Montana, Missouri, Santo Domingo, Dominican Republic and other locations.

65. Bostik representatives repeatedly traveled to Heat Mirror manufacturers and through the 1990's and as late as 1997 and December of 1998 to promote its Heat Mirror insulating glass sealants. During these presentations Bostik representatives represented that 3190 HM had suffered no field failures. Since none of the manufacturers (including Ultra) knew the scope of the misrepresentations, the manufacturers continued to promote and sell Heat Mirror IGU.

66. In reliance upon the representations as to the appropriateness of the 3190 HM sealant made by Southwall and Bostik, manufacturers such as Ultra had purchased and used Bostik 3190 HM sealant exclusively since at least 1991. Southwall likewise made the same representations to Wasco when it was addressing the appropriateness of incorporating Heat Mirror insulating glass into its E-Class skylight. By 1988, Wasco had taken steps to monitor and study the temperatures affecting Wasco skylights and was acutely aware of the impact of the inherent elevated temperatures affecting its skylights and their materials. Wasco specifically relied upon Southwall representations as to the durability of Heat Mirror IGU for such skylight application. Ultra representatives innocently, but specifically, also represented to Wasco representatives that Heat Mirror was the highest performing

insulating glass on the market in terms of insulating, reduction of heat and durability. Parties such as Wasco specifically depended on such repeated assurances to performance and durability and chose to market, sell and warranty Heat Mirror insulating glass sealed with Bostik 3190 HM sealant.

67. As set forth in detail, *supra,* in contrast to the representations made to window and skylight manufacturers such as Ultra and Wasco, Southwall and Bostik tested the 3190 HM sealant and, in 1990, learned that the sealant was defective, breaking down for various reasons including exposure to ultra violet light contained within ordinary sunlight, and when placed in climates where conditions generated increased temperatures inside the IGUs. Despite this knowledge, Bostik and Southwall representatives continued to stress the superior qualities of Bostik's polyurethane 3190 HM sealant over the competing polysulfide sealants.

68. During the 1980s and the early 1990s, it was well known within Southwall that Heat Mirror film was the "cash cow," i.e., the sale of Heat Mirror film was generating the revenue required to underwrite all research and development at Southwall Technologies. Accordingly, there was every economic incentive not to warn manufacturers of the inherent shortcomings of the manufacturing Heat Mirror Insulating Glass as developed and licensed by Southwall Technologies.

69. As a result of Southwall and Bostik continued misrepresentations supported by Bostik's repeated misrepresentations, industry journals and papers, Heat Mirror manufacturers repeated the misrepresentatives with the intent that distributors such as Wasco would rely

and continue to purchase Heat Mirror IG. Wasco did rely upon such representations in part and continued to buy Heat Mirror IGUs sealed with Bostik sealant until after Bostik ceased production. As a result, Wasco has been damaged because Wasco manufactured and warranted the longevity and durability of thousands of past and future Heat Mirror IGUs with defective Bostik sealant.

70. The costs associated with warranted window replacement (past and future) for Wasco alone exceeds $1,000,000.00. Moreover, Wasco's reputation as a supplier of high-quality construction products has been severely damaged and Wasco's market share has dropped as a result of the problems associated with the defective window technology.

Class Allegations

71. Plaintiff brings this action on behalf of themselves and all others similarly situated, defined as follows:

> "all individuals, proprietorships, partnerships, corporations, and other business and legal entities in the United States, including the District of Columbia, who manufactured and/or sold and warranted the service life of Heat Mirror insulating glass utilizing Bostik 3190 HM sealant between 1989 and 1999." ("The Class Members.")

72. Defendant Bostik Findley's predecessor Bostik, Inc. previously stipulated and agreed upon a recognized class of consumers in the class action settlement in the *McKernan v. Black & Decker* matter. The agreed upon class consisted of:

> "all individuals, proprietorships, partnerships, corporations, and other business and legal entities in the United States, including the District of Columbia, who owned or at any time have owned real property, including, but not limited to, homes, condominiums, apartment complexes, or commercial buildings, which at any time during such ownership, contain or contained "Heat Mirror™" insulating glass units sealed with 3190-HM sealant manufactured by Bostik, Inc. Excluded from the class are defendants, any officers or directors thereof together with the legal representatives, heirs, successors or assigns of any defendant."

This class would include all consumers of the herein referenced product manufactured and distributed by the manufacturers and distributors sought to be included and certified in this matter.

73. Defendant Southwall's previously stipulated and agreed upon a recognized class of consumers in the class action settlement in the *McKernan v. Black & Decker* matter. The agreed upon class consisted of:

> "all individuals, proprietorships, partnerships, corporations, and other business and legal entities in the United States, including the District of Columbia, who owned or at any time have owned real property, including, but not limited to, homes, condominiums, apartment complexes, or commercial buildings, which at any time during such ownership, contain or contained "Heat Mirror™" insulating glass units sealed with 3190-HM sealant manufactured by Bostik, Inc. Excluded from the class are defendants, any officers or directors thereof together with the legal

representatives, heirs, successors or assigns of any defendant."

This class would include all consumers of the herein referenced product manufactured and, distributed by the manufacturers and distributors sought to be included and certified in this matter.

74. This action has been brought and may properly be maintained as a class action satisfying the numerosity, commonality, typicality, adequacy, and superiority requirements, because:

a. Individual joinder of Class Members would be impracticable. Plaintiffs are informed and believe and based thereon allege that the class consists in excess of twenty-five (25) manufacturers and an equal or larger number of distribution/resellers of Heat Mirror insulating glass.

b. Common questions of law and fact exist as to all members of the Class that predominate over any question that affects only individual Class Members. These common questions of law and fact include, without limitation:

(1) whether Bostik's 3190 HM sealant was overly sensitive to u.v. light and therefore defective in a Heat Mirror IGU application;

(2) whether Bostik 3190 HM sealant was overly sensitive to the elevated temperatures experienced in Heat Mirror IGU application;

(3) whether "Heat Mirror" insulating glass units using Bostik's 3190 HM sealant are defective as a result of the application of Bostik's 3190 HM sealant;

(4) whether "Heat Mirror" insulating glass units had a recognized product life expectance of at least twenty-five (25) years;

(5) whether "Heat Mirror" insulating glass units failed to meet their recognized product life expectancy;

(6) whether Bostik and Southwall knew or should have known that "Heat Mirror" insulating glass units were defective;

(7) whether Bostik and Southwall misrepresented the quality of "Heat Mirror" insulating glass units to the various manufacturers;

(8) whether Bostik and Southwall concealed the fact that "Heat Mirror" insulating glass units were defective with intent to induce Plaintiffs' and members of the Class' reliance;

(9) whether Plaintiffs and members of the Class reasonably relied on the facts they were told and on the recognized industry standard for insulating glass units that "Heat Mirror" insulating glass units had a life expectancy of at least twenty-five (25) years;

(10) whether Defendants Bostik and Southwall are liable for fraudulent concealment;

(11) whether Defendants Bostik's and Southwall's conduct constitutes unfair or deceptive business practices;

(12) whether Defendants Southwall and Bostik are liable for strict product liability;

(13) whether Defendants Southwall and Bostik are liable for negligence; and

(14) whether Plaintiffs and members of the Class suffered damages as a result of Defendants' actions.

75. The representative Plaintiffs' claims are typical of those of the Class because Wasco specifically acquainted itself with temperatures experienced with products in the field. Plaintiff Wasco sold defective "Heat Mirror" insulating glass windows using Bostik 3190 HM sealant and warranted the durability of the units. Plaintiff Wasco has been required to replace hundreds/thousands of defective/failed Heat Mirror IGUs.

76. The representative Plaintiff is an adequate representative of the Class because it shares the same interests as all Class Members and because its claims and losses are typical of those of the Class Members. The representative Plaintiff has retained competent counsel who is exceedingly experienced with the issues set forth in this Complaint, in class action litigation and who will fairly and adequately protect the interests of the Class Members.

77. A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all persons who purchased Bostik 3190 HM sealant and manufactured insulating glass units using Bostik 3190 HM sealant and/or sold and warranted such 3190 HM sealed units is impracticable. Most such losses are modest in relation to the expense and burden of individual prosecution of the litigation necessitated by the defendants' wrongful conduct. It would be virtually impossible for the Class Members to efficiently and economically redress their wrongs individually. Even if all Class Members themselves could afford such individual litigation, the court system would

benefit from a class action. Individualized litigation would present the potential for inconsistent or contradictory judgments. Individualized litigation would also magnify the delay and expense to all parties and to the court system presented by the issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the benefit of comprehensive supervision of a single court, as well as economy of scale and expense.

FIRST CLAIM FOR RELIEF

(Breach of Express Warranty Against Bostik)

78. Plaintiff hereby incorporates paragraphs 1 through 77 as if fully set forth herein.

79. During the 1980s, Wasco studied a number of different options for high performance insulating glass to incorporate its "new" E-Class skylight. As part of its investigation, Wasco studied Heat Mirror as one option. On or before December, 1988, plaintiff was approached by defendant Southwall and induced to market Southwall's Heat Mirror insulating glass instead of the other options presented and purchase Heat Mirror units which, with the exception of Hurd Millwork, were uniformly manufactured with Bostik's 3190 HM polyurethane sealant. Wasco and members of the distributing and manufacturing classes were told that Heat Mirror had the most durable seal on the market and that Bostik's polyurethane had a lower moisture vapor transmission rate and it "effectively sealed Heat Mirror Insulating Glass." Bostik's sealant specification sheet (distributed to the entire industry including Ultra) further indicated the sealant was capable of a service temperature range up to 200°F. The assurance that

Bostik's sealant could withstand temperatures of 200°F was material to Southwall and Bostik's marketing efforts and Wasco's decision to utilize sealed Bostik 3190 HM sealant Heat Mirror insulating glass from December 1999 onward.

80. As set forth above, Wasco is a classic example of the success of Bostik's marketing strategy in that, after Southwall sold Wasco on the desirability and appropriateness of Bostik sealed Heat Mirror IGUs for incorporation into its new E-Class skylights in 1989, Bostik sales representatives approached Wasco representatives and convinced Wasco to switch from the polysulfide sealant it was then using to Bostik polyurethane for Wasco's manufacture of non-Heat Mirror insulating glass units. Bostik's representatives presented Wasco representatives with data sheets representing that: Bostik's polyurethane could withstand environments of 200°F which provided a safety margin for Wasco's overhead/sloped glazed products; Bostik polyurethane could bind over contaminated surfaces providing a safety margin for Wasco manufactured IGUs; and that even though the sealant would crack and craze in any application, this would not impair the integrity of the seal in any IGU utilizing Bostik polyurethane sealant.

81. Wasco and members of the distributing and manufacturing classes (Ultra, Reliant and others) performed all conditions, covenants and promises required on their part to he performed in accordance with the terms and conditions of the purchase of Bostik polyurethane sealant.

82. Bostik expressly warranted and promised that this sealant would be fit for its intended and required use to effectively seal insulated glass units, including Heat

Mirror IGUs for use in environments with temperatures of up to 200°F, even when contaminated glass was utilized.

83. Bostik breached these express warranties from the moment it sold its first shipment of Bostik polyurethane sealant. Bostik also breached these warranties when it first shipped 3190 HM sealant, which, due to its unreasonable sensitivity to u.v. light, elevated temperatures and other factors and the resulting inability for the sealant to effectively seal Heat Mirror IGUs long term and made the sealant unfit for its only specified use as a sealant on Heat Mirror IGUs.

84. On or around May 1, 2000, Wasco, through counsel, notified Michael Hoban of Bostik of its increased warranty replacement costs resulting from seal failure and further advised Mr. Hoban:

> Wasco understands that Bostik, Inc. supplied the sealant for the Heat Mirror product. The Bostik sealant, and/or the sealing process, was the cause of the failure of the failure of the product [Wasco Heat Mirror skylights].

Wasco counsel informed of losses suffered in excess of $100,000 and continuing monthly. Bostik had already been notified of similar claims from other manufacturers and distributors in the industry, but did not disclose this to Wasco.

85. After Wasco gave notice of the defect in Bostik's polyurethane sealant, Bostik, through its attorneys rejected Wasco's claim and on August 11, 2000, informed Wasco: "Bostik therefore rejects Wasco's demand and is prepared to litigate this matter should Wasco decide to pursue its meritless claims." Wasco, through counsel, further explained in personal discussions with Bostik

counsel the significance of the defects in the Bostik sealant, thereby further providing Bostik with notice and the ability to investigate Wasco's claims.

86. As a result of Bostik's misrepresentations and concealments of these misrepresentation and their manifestations, plaintiff did not discover the extent of Bostik's breach until it learned that Bostik polyurethane sealant, including 3190 HM was unreasonably sensitive to u.v. light and/or elevated temperatures and therefore not fit for its intended and specified purpose as a sealant for insulating glass units including Heat Mirror IGUs, whether installed in overhead/sloped or in vertical glass applications, and well after Bostik, withdrew its Heat Mirror polyurethane from the market in 1999. Plaintiff first learned that the Bostik 3190 HM sealant was defective and unfit for use on Heat Mirror IGUs until 2001.

87. As a result of Bostik's breach of the express warranties set forth above, Wasco and members of the distributing and manufacturing classes manufactured hundreds of thousands of "at risk" skylight and window insulating glass units, including Heat Mirror units, and have been forced to respond to third-party claims by replacing the damaged, leaking insulating glass units, including Heat Mirror IGUs. Wasco and members of the distributing and manufacturing classes suffered extensive damage to their business reputations and relationships to their distributors, resulting in lost profits and sales in an amount according to proof at trial.

SECOND CLAIM FOR RELIEF

(Fraud – Intentional Misrepresentation – Against Southwall and Bostik)

88. Plaintiff hereby incorporates paragraphs 1 through 87 as if fully set forth herein.

89. From at least 1984, Southwall knew of design limitations which inherently led to reduced lifetime for Heat Mirror IGU when compared to traditional units utilizing single spacer IGUs rather than the dual spacer or triple spacer utilized in Heat Mirror. (See Exhibit C.) Southwall failed to warn manufacturers and distributors of this inherent shortcoming, rather, choosing to continuously advertise and represent that Heat Mirror IGU had the most durable seal. As part of its joint development of "HM" sealant, and to further increase sales of the sealant and its own Heat Mirror film sales, Southwall instructed and required manufacturers to use Bostik HM sealants to manufacture and assemble Heat Mirror IGUs. In requiring the use of a specific sealant, Southwall had a duty to make sure that the sealant was fit for its required use. When Southwall marketed and sold its technology, Southwall knew that numerous manufacturers and distributors provided purchasers with lengthy (10 years or more) lifetime warranties for Heat Mirror IGUs manufactured pursuant to the instructions.

90. In various versions of the Heat Mirror Manual, Southwall made the following representations: "the sealants approved for use in manufacturing Heat Mirror IGUs have passed extensive Southwall testing." In the VAR, Southwall required Heat Mirror manufacturers to use the approved sealant. Section 3(a) of the VAR contains the following requirement:

Buyer's manufacture of insulating glass products incorporating the Product shall be in strict accordance with the prescribed production and quality standards.

91. In the Heat Mirror Manual and Product Release Announcements Southwall represented to members of the distributing and manufacturing classes that all sealants used in the Heat Mirror IGU manufacturing process, including Bostik's HM products had been extensively tested and appropriate for the manufacture of Heat Mirror insulating glass.

92. As set forth in greater detail above, Bostik misrepresented the capabilities of its sealants in every data specification sheet it published from 1984 to the present. (See Exhibit I.) Bostik's polyurethane sealant Product Manager, Joseph Amstock and engineers such as John Duffy reinforced the misrepresentations concerning the capabilities of the sealant to withstand high temperatures, indirect ultraviolet light and bind over contaminated surfaces through industry papers, journals and books.

93. As set forth above in greater detail at paragraphs 32 - 36, Southwall representatives informed Wasco representatives that Bostik insulating glass sealants were extensively tested and approved by Southwall for use in the Heat Mirror manufacturing process. Southwall's Alex Tennant and Scott Creason both informed the Wasco representatives that all component parts, including the insulating glass sealants, had been tested by Southwall prior to being approved for incorporation into the manufacturing process. In fact, in January of 1987 and April of 1987, Tennant and Creason made presentations to Wasco representatives concerning Heat Mirror insulating glass

and as set forth above represented that the Bostik polyurethane had undergone extensive testing and was found to be appropriate for use in Heat Mirror insulating glass including Wasco's intended application: skylights.

94. Bostik reinforced these misrepresentations by misrepresenting the characteristics of the sealants to its own outside sales representatives. The misrepresentations included overstating the service temperature range and the ability of Bostik polyurethane to bind over contamination. Bostik further instructed its sales representatives that although Bostik polyurethane crazes and cracks, such cracking does not affect the integrity of seals of insulated glass units.

95. As intended by Bostik, these sales representatives in turn repeatedly made these misrepresentations to all purchasers of Bostik polyurethanes including Wasco, Ultra and Four Seasons. Based upon the representations given to him by Southwall and Bostik, Ron Saunders of Ultra Glass, a Heat Mirror manufacturer repeated these representations of "extensive testing" to Bob Sampson, and others at Wasco in 1987 and 1988 during presentations when he convinced Wasco that it should not manufacture its own Heat Mirror but rather purchase Heat Mirror IGU's fabricated by Ultra. The above representations and misrepresentations were uniform and so pervasive that every purchaser of Heat Mirror insulating glass, including Wasco, believed them and relied upon them when deciding whether to switch to and/or purchase or repurchase Heat Mirror IGU's or Bostik HM polyurethane sealants.

96. The above representations made by Southwall and Bostik were in fact false. The sealants were not

extensively tested by anyone. At the time Wasco decided to begin the purchase and incorporation of Heat Mirror insulating glass into its skylights, neither Bostik nor Southwall knew how high the maximum internal temperature reached in the Heat Mirror 66 which was intended to be incorporated into a Wasco skylight or in any other installation. Neither Bostik nor Southwall knew what all the appropriate stresses were for appropriately testing the Heat Mirror units with Bostik polyurethane insulating glass sealant. Neither had studied the effects of the increased internally reflected light resulting from the inclusion of Heat Mirror film in an IGU. Without knowing the stresses that would be placed upon the Heat Mirror IGU's sealed with Bostik polyurethane sealants neither defendant could know how to either appropriately or "extensively" test.

97. The true facts were that the sealant had never been tested in a Heat Mirror IGU configuration at temperatures above 140°F. The true facts were that the subject Heat Mirror units had never been exposed to long term filed testing – testing which according to Bostik is a greater indicator of durability than the ASTM E773/774 laboratory testing to which the sealants were subjected. The true fact is that the subject Heat Mirror units were never subjected to Xenon Arc testing – a laboratory test which more accurately reflects exposure to sunlight. At least as to the 3190 HM sealant, the true fact is that it was simply "grandfathered in" to the approved list because of a desire to quickly eliminate the "Tigertail" or "Spiderweb" problems associated with the mercury laden 3180 HM sealant. Accordingly, the true facts are that Heat Mirror insulating glass containing the Bostik sealants were not appropriately tested or extensively tested –

either by Southwall or Bostik. As a result of the lack of testing, neither Bostik nor Southwall knew that Heat Mirror IGUs, utilizing Bostik 3190 HM sealant would develop leaks because the sealant was unreasonably sensitive to and susceptible to deterioration from exposure to ultraviolet light contained in ordinary sunlight and increased in Heat Mirror.

98. After Wasco began marketing its skylights with the Heat Mirror option, Southwall and Bostik did, in fact, test and investigate the Bostik HM sealant problem and learned that it was susceptible to breakdown when exposed to ultraviolet light and elevated temperatures generated in Heat Mirror insulating glass. Defendants did not inform Wasco or members of the distributing or manufacturing classes of this fact. Southwall and Bostik also knew and discussed the fact that the sealant was tested and rated at only 140°F and repeatedly discussed this fact.

99. When Southwall and Bostik made the above representations, it knew them to be false and made the representations with the intention to deceive and defraud plaintiff and members of the distributing and manufacturing classes and to induce plaintiff and members of the distributing and manufacturing classes to act in reliance on these representations in the matter hereafter alleged, or with the expectation that plaintiff would so act.

100. At the time these representations were made and at the time plaintiff and members of the distributing and manufacturing classes took the actions alleged herein, plaintiff was ignorant of the falsity of the representations and believed them to be true. In reliance on these representations, manufacturers were induced to and did purchase Heat Mirror film and manufacture Heat Mirror

units and/or purchase Heat Mirror units containing Bostik HM sealant, including 3190 HM sealant, all to the financial benefit of Southwall and Bostik. Had plaintiff and members of the distributing and manufacturing classes known the actual facts, they would not have taken such actions. Reliance on the representations of Southwall and Bostik was justified because Wasco and other members of the distributing and manufacturing classes were ignorant of the falsity of defendants' representations and were misled by defendants as to the cause of the seal failures.

101. As a proximate result of the fraudulent conduct of Southwall and Bostik as herein alleged, plaintiff and members of the distributing and manufacturing classes were induced to continue producing, assembling and selling Heat Mirror IGUs, were induced to continue purchasing products from Southwall, and were induced to continue purchasing and using Bostik 3190 HM sealant. Plaintiff and members of the distributing and manufacturing classes were further induced to change production processes for manufacturing and assembling Heat Mirror IGUs and induced to replace leaking IGUs with new IGUs also assembled with Bostik 3190 HM sealant, which have also developed leaks. By reason of the foregoing, plaintiff and members of the distributing and manufacturing classes have suffered damages in excess of $100,000,000.00, in a precise amount to be proved at trial.

102. The aforementioned intentional conduct was fraudulent, oppressive and malicious, and was despicable, conduct that subjected plaintiff to a cruel and unjust hardship in conscious disregard of plaintiff and members of the distributing and manufacturing classes' rights, so as to justify an award of exemplary and punitive damages.

THIRD CLAIM FOR RELIEF

(Negligence Against Southwall)

103. Plaintiff hereby incorporates paragraphs 1 through 102 as if fully set forth herein.

104. From at least 1985, Southwall knew of design limitations which inherently led to reduced lifetime for Heat Mirror IGU when compared to traditional units utilizing single spacer IGUs rather than the dual spacer or triple spacer utilized in Heat Mirror. Southwall failed to warn manufacturers and distributors of this inherent shortcoming, rather, choosing to continuously advertise and represent that Heat Mirror IGU had the most durable seal. As part of the agreement, Southwall instructed and required manufacturers to use Bostik 3190 HM sealant to manufacture and assemble Heat Mirror IGUs. In requiring to use a specific sealant, Southwall had a duty to make sure that the sealant was fit for its required use. Southwall knew that numerous manufacturers and distributors provided purchasers with lengthy (10 years or more) lifetime warranties for Heat Mirror IGUs manufactured pursuant to the instructions.

105. Southwall breached this duty by specifying and requiring plaintiff to use a defective sealant that was not fit for its required use, in that it develops leaks within 3 to 5 years due to an over-sensitivity to u.v. light and high temperature experienced in Heat Mirror units. Southwall learned of facts leading a reasonable person to know that the Bostik polyurethane was not fit for use in the Southwall Heat Mirror manufacturing process.

106. Southwall's negligent conduct in developing, specifying and requiring the use of Bostik 3190 HM

sealant proximately caused the IGUs to develop premature leaks causing condensation or "fogging" inside the IGUs. Southwall knew or should have known that the promise it made for the performance of Heat Mirror insulating glass could not be fulfilled in units utilizing the seal systems mandated by Southwall whether manufactured by Wasco, Ultra or others. Southwall knew or should have known that manufacturers and/or distributors of Heat Mirror contractually guarantee or warranty the product and that as a result of the premature failures, manufacturers and distributors would suffer financial losses.

107. As a result of the damage to the Heat Mirror filament and condensation within the IGUs, plaintiff and members of the distributing and manufacturing classes have been and will be forced to replace the damaged units and suffered damages and lost materials and labor in an amount in excess of $100,000,000.00 in a precise amount to be proven at trial.

FOURTH CLAIM FOR RELIEF

(Strict Products Liability Against Bostik)

108. Plaintiff hereby incorporates paragraphs 1 through 107 as if fully set forth herein.

109. Bostik manufactures markets and sells polyurethane insulating glass sealants, including 3190 HM sealant. It is and at all times relevant to this action, was foreseeable to Bostik that these sealants would be used in the manufacturing insulating glass units, including Heat Mirror IGUs, and in fact Bostik manufactured the sealants for that sole purpose.

110. Bostik polyurethane sealants, including 3190 HM sealant, are defective in that they prematurely breaks down due to over-sensitivity to heat and u.v. light. As a result of this breakdown, the sealants degrade, contracts, crack and craze, and loses adhesive qualities. Ordinary consumers of Bostik sealants do not expect them to rapidly deteriorate and there are no benefits to this sensitivity to heat and u.v. light and resulting deterioration.

111. Bostik's sealant failure has caused property damage to Heat Mirror IGUs manufactured and sold by plaintiff and others resulting in condensation or "fogging" within the IGU, which required plaintiff and members of the distributing and manufacturing classes to honor warranty commitments and replace the damaged IGUs.

112. Plaintiff and members of the distributing and manufacturing classes have been damaged as a direct and proximate result of the defective Bostik sealants, including 3190 HM and in an amount in excess of $100,000,000.00, and in a precise amount to be proven at trial.

FIFTH CLAIM FOR RELIEF

FOR UNFAIR BUSINESS PRACTICES

(Against Defendants Bostik and Southwall)

113. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 112 as if fully set forth herein.

114. Plaintiff brings this cause of action both in its in individual capacity on behalf of the manufacturing and distributing classes and on behalf of the general public.

115. Defendant Bostik's and Southwall's actions, as set forth above, constitute unfair and deceptive business practices in violation of Unfair Business Practices Act, California Business and Professions Code § 17200, *et seq.*, and similar laws of other states.

116. In particular, the following acts, among others, constitute unfair and deceptive business practices:

a. Bostik's and Southwall's development, manufacture and sale of 3190 HM sealant, a defective product, while expressly and impliedly (through concealment) representing the product to be effective;

b. Bostik's pattern of misrepresenting the ability/capability of Bostik polyurethane sealants to withstand environments between temperatures of -40°F to 200°F through publication of Technical Data Sheets such as Exhibits D and I, disseminating them to the widest possible audience with the intent that persons making decisions to select appropriate insulating glass sealants rely thereon, and through publication of industry journal articles extolling the same characteristics such as Exhibit B, the July, 1990, Glass Magazine article;

c. Bostik's pattern of misrepresenting the ability/capability of Bostik polyurethane sealants to bind over contaminated surfaces, i.e., surfaces contaminated by cutting oils, silicone sprays and hand grease (all issues appropriate for consideration by persons making decisions to select appropriate insulating glass sealants in industry journals, such as the 1984 IGMAC paper, Exhibit G, or the Glass in the Construction Industry book, Exhibit H, and in the training and education of its own sales force and others in the insulting glass sealants market;

d. Bostik's pattern of advising its own sales representatives and other industry-related personnel that although Bostik polyurethanes crack and craze, such condition does not affect the integrity of the insulating glass seal; and

e. Bostik's and Southwall's failure to disclose to purchasers that "Heat Mirror" insulating glass units are defective.

117. As a proximate result of defendants Bostik's and Southwall's actions, plaintiff and members of the distributing and manufacturing classes are entitled to restitution in an amount to be determined at trial and to an injunction ordering defendants Bostik and Southwall to immediately cease the foregoing actions and such further relief as is requested infra.

SIXTH CLAIM FOR RELIEF

FOR RELIEF FOR UNFAIR BUSINESS PRACTICES

(Against Defendant Southwall)

118. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 117 as if fully set forth herein.

119. Plaintiff brings this cause of action both in its individual capacity on behalf of the manufacturing and distributing classes and on behalf of the general public.

120. Defendant Southwall's actions, as set forth above, constitute unfair and deceptive business practices in violation of Unfair Business Practices Act, California Business and Professions Code § 17200, *et seq.*

121. In particular, the following acts, among others, constitute unfair and deceptive business practices:

a. Southwall's marketing of Heat Mirror technology as containing the most durable seal in the insulating glass industry while knowing from its own testing that the seal for Heat Mirror technology was either one-third or one-half as durable as other types of insulating glass; and

b. Southwall's creation and marketing of "Heat Mirror" technology, a defective technology mandating the use of the 3190 sealant or, for part of the relevant period, one alternative sealant, while expressly and impliedly (through concealment) representing Bostik sealants including the 3190 HM sealant and the "Heat Mirror" technology to be effective; and

c. Southwall's failure to disclose to consumers its discoveries concerning inherent defects in the technology leaving manufacturers and distributors unfairly economically responsible to consumers; and

d. Southwall's failure to disclose that "Heat Mirror" insulating glass units are defective.

122. As a proximate result of defendant Southwall's actions, plaintiff and members of the distributing and manufacturing classes are entitled to restitution in an amount to be determined at trial and to an injunction ordering defendant Southwall to immediately cease the foregoing practices and such further relief as is requested infra.

SEVENTH CLAM FOR RELIEF

FOR FALSE OR MISLEADING BUSINESS PRACTICES

(Against Defendants Bostik and Southwall)

123. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 though 122 as if fully set forth herein.

124. Plaintiff brings this case of action both in its individual capacity on behalf of the manufacturing and distributing classes and on behalf of the general public.

125. Defendant Bostik's and Southwall's actions, as set forth above, constitute false and misleading business practices in violation of California Business and Professions Code § 17500 *et seq.*, and similar laws of other states.

126. In addition to these matters set forth above, the following acts, among others, constitute unfair and dec[illegible]-tive business practices:

a. Bostik's and Southwall's development, manufacture and sale of 3190 HM sealant, a defective produce, while expressly and impliedly (through concealment) representing the product to be effective;

b. Bostik's and Southwall's repeated representations that Bostik 3190 HM sealant effectively sealed Heat Mirror insulating glass;

c. Bostik's and Southwall's representations that no seal lasts longer than the seal of a Heat Mirror IGU;

d. Southwall's repeated representation that the seal on a Heat Mirror IGU contains the most durable seal in the industry; and

e. Bostik's and Southwall's failure to disclose to purchasers that "Heat Mirror" insulating glass units are defective in that Bostik and Southwall knew a dual seal unit of conventional insulating glass was at least three times as durable as Heat Mirror IGU sealed with Bostik's polyurethane sealant.

127. As a proximate result of defendants Bostik's and Southwall's actions, plaintiff and members of the distributing and manufacturing classes are entitled to restitution in an amount to be determined at trial and to an injunction ordering defendants Bostik and Southwall to immediately cease the foregoing activities and such further relief as is requested, infra, manufacturing Bostik polyurethane insulating glass sealant or any representation that Heat Mirror units manufactured with polyurethane sealant, including Bostik 3190 HM, are the most durable insulating glass units which will last longer than any other IGU seal configuration.

PRAYER FOR RELIEF:

WHEREFORE, plaintiff prays for the following relief:

1. For a judgment for damages against Bostik in an amount according to proof but not less than $100,000,000.00;

2. For a judgment against Southwall for damages in an amount according to proof, but not less than $100,000,000.00;

3. For a judgment of disgorgement and restitution against defendant Bostik in an amount according to proof, but not less than $100,000,000.00;

4. For a judgment of disgorgement and restitution against defendant Southwall in an amount according to proof, but not less than $100,000,000.00;

5. For prejudgment interest as allowed by law;

6. For punitive and exemplary damages in an amount according to proof;

7. For an injunction preventing Bostik from representing that its sealant can effectively adhere over contaminated glass, or has a service temperature range in excess of 140°F or that the crazing and cracking suffered by polyurethane sealant does not affect the integrity of the insulated glass unit seal;

8. For injunctive relief directing defendant Bostik to inform each purchaser of Bostik polyurethane sealant that it has never tested for and cannot, and never could, substantiate, its published representations that its polyurethane sealants can bind over contaminations, that it has no testing to support a service temperature range of over 140°F, and that the cracks and crazing occurring in Bostik polyurethane sealants can and will lead to premature failure of insulating glass units;

9. For injunctive relief directing defendant Southwall Technologies to inform manufacturers and distributors that it has no evidence to substantiate its claims that seals in Heat Mirror IGU are the most durable in the industry;

10. For injunctive relief directing defendant Southwall Technologies to inform manufacturers and distributors that the seals in Heat Mirror IGU are either one-third or one-half as durable as other insulating glass units;

11. For the reasonable and necessary attorneys' fees incurred by plaintiff; and

12. For such further relief as this court deems just and proper.

Dated: June 27, 2003

LAW OFFICES OF T. SCOTT TATE

By: /s/ T. Scott Tate
T. SCOTT TATE
Attorney for Plaintiff
WASCO PRODUCTS, INC.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38 and Local Rule 3-6 plaintiff Wasco Products, Inc hereby demands a trial by jury on all legal issues presented in this Third Amended Complaint.

Dated: June 27, 2003

LAW OFFICES OF T. SCOTT TATE

By: /s/ T. Scott Tate
T. SCOTT TATE
Attorney for Plaintiff
WASCO PRODUCTS, INC.

NOTICE OF RELATED CASE

This matter is factually related to the action previously brought by another Heat Mirror IGU manufacturer in *Jeld-Wen, inc. v. Southwall Technologies, Inc. and Bostik, Inc.*, Northern District of California Case No. C-97-3701 SBA and assigned to the Honorable Saundra Brown Armstrong, Oakland Division, and *Hurd Millwork Company, Inc. v. Southwall Technologies,* Northern District Case No. C-00-3820 SBA and assigned to the Honorable Saundra Brown Armstrong, Oakland Division.

[Exhibits Omitted In Printing]

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Attorneys For Defendant
SOUTHWALL TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WASCO PRODUCTS, INC., Plaintiff, v. SOUTHWALL TECHNOLOGIES, INC. and BOSTIK, INC. Defendants.	NO. C 02 2926 (SBA) **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT SOUTHWALL TECHNOLOGIES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT** **DEMAND FOR JURY TRIAL**

Defendant Southwall Technologies, Inc. ("Southwall"), by its attorneys Leon & Leon and Choate, Hall & Stewart,

hereby states the following as and for its answer to the Third Amended Complaint:

1. Paragraph 1 of the Third Amended Complaint purports to state a legal conclusion as to which no response from Southwall is required.

2. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2 of the Third Amended Complaint.

3. Southwall denies the allegations set forth in Paragraph 3 of the Third Amended Complaint except it admits that it has its principal place of business in Palo Alto, California

4. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Third Amended Complaint.

5. Southwall denies the allegations set forth in Paragraph 5 of the Third Amended Complaint, except it admits that it has its principal place of business in Palo Alto, California. Southwall further states that to the extent the allegations in Paragraph 5 purport to state a legal conclusion, no response from Southwall is required.

6. Southwall denies the allegations set forth in Paragraph 6 of the Third Amended Complaint, except it admits that it has its principal place of business in Palo Alto, California. Southwall further states that to the extent the allegations in Paragraph 6 purport to state a legal conclusion, no response from Southwall is required.

7. Southwall denies the allegations set forth in Paragraph 7 of the Third Amended Complaint.

8. Southwall denies the allegations set forth in Paragraph 8 of the Third Amended Complaint, except it admits that during the early 1980's its engineers developed the process for manufacturing Heat Mirror HM film, which incorporates a process for sputter coating metals onto a plastic film.

9. Southwall denies the allegations set forth in Paragraph 9 of the Third Amended Complaint, except it admits that insulated glass units ("IGUs") are generally comprised of two pieces of glass separated by a spacer bar, that beginning in the early 1980's Heat Mirror film was incorporated into IGUs, that in Heat Mirror IGUs the Heat Mirror film is suspended between the two lites of glass, that the Heat Mirror IGU is sealed using a sealant, and that Heat Mirror IGUs were incorporated into window frames and skylights made of aluminum, vinyl or wood and later installed in commercial and residential buildings.

10. Southwall denies the allegations set forth in Paragraph 10 of the Third Amended Complaint, except that it admits that Southwall representatives or others may have referred to Heat Mirror IGUs as the "Mercedes Benz" and/or "Cadillacs" of IGUs, and that architects may specify Heat Mirror IGUs in part because they can reduce the loads for HVAC systems.

11. Southwall denies the allegation set forth in Paragraph 11 of the Third Amended Complaint, except that it admits that it publishes and provides to its customers a Heat Mirror Manual.

12. Southwall denies the allegations set forth in Paragraph 12 of the Third Amended Complaint, except it admits that it has entered into Value Added Reseller

Agreements ("VAR") with various Heat Mirror Manufacturers at various times. To the extent that Paragraph 12 purports to characterize a particular VAR, Southwall states that each VAR speaks for itself.

13. Southwall denies the allegations set forth in Paragraph 13 of the Third Amended Complaint, except that it admits that, when Heat Mirror was first introduced, manufacturers of IGUs used a polysulfide sealant and epoxy to construct IGUs with Heat Mirror. To the extent that Paragraph 13 purports to characterize Exhibit B to the Third Amended Complaint, Southwall states that the article speaks for itself. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 of the Third Amended Complaint regarding conduct, statements or opinions by Bostik.

14. Southwall denies the allegations set forth in Paragraph 14 of the Third Amended Complaint, except that Southwall admits that it has conducted inquiries regarding the intrusion of moisture into IGUs. To the extent that Paragraph 14 characterizes Exhibit C to the Third Amended Complaint, Southwall states that the document speaks for itself.

15. Southwall denies the allegations set forth in Paragraph 15 of the Third Amended Complaint, except that it admits that Bostik manufactured a polyurethane sealant (3180) for use in manufacturing standard insulating glass units. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 15 regarding conduct, statements or opinions by Bostik.

16. Southwall denies the allegations set forth in Paragraph 16 of the Third Amended Complaint, except that it admits that, generally, manufacture of IGUs with a single seal simplifies the manufacturing process. To the extent that Paragraph 16 characterizes Exhibit E to the Third Amended Complaint, Southwall states that the document speaks for itself.

17. Southwall denies the allegations set forth in Paragraph 17 of the Third Amended Complaint, except it admits that in 1984 Bostik qualified 3180 HM for use in Heat Mirror IGUs in a dual-seal application, and in 1985 Bostik's 3180 HM sealant was qualified for use in Heat Mirror IGUs in a single seal application.

18. Southwall denies the allegations set forth in Paragraph 18 of the Third Amended Complaint, except it admits that, generally, customers prefer a single seal application to a dual seal application because a single seal application requires less labor, has fewer opportunities for error in application, and generally reduces manufacturing costs.

19. Southwall denies the allegations set forth in Paragraph 19 of the Third Amended Complaint, except it admits that in a dual seal configuration, generally two sealants are combined, that its customers generally prefer a single seal application, and that in 1985 Bostik's 3180 HM sealant was qualified for use in Hear Mirror IGUs in a single seal application.

20. Southwall denies the allegations set forth in Paragraph 20 of the Third Amended Complaint. To the extent that Paragraph 20 characterizes Exhibit F to the Third Amended Complaint, Southwall states that the document speaks for itself.

21. Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 21 regarding conduct, statements or opinions by Bostik. To the extent that Paragraph 21 characterizes Exhibit H to the Third Amended Complaint, Southwall states that the document speaks for itself.

22. Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 22 regarding conduct, statements or opinions by Bostik. To the extent that Paragraph 22 characterizes Exhibits D, I and B to the Third Amended Complaint, Southwall states that the documents speak for themselves.

23. Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 23 regarding conduct, statements or opinions by Bostik.

24. Southwall denies the allegations set forth in Paragraph 24 of the Third Amended Complaint, except it admits that prior to 1989 Bostik's 3180 HM sealant was the only polyurethane sealant approved for use in manufacturing Heat Mirror IGUs.

25. Southwall denies the allegations set forth in Paragraph 25 of the Third Amended Complaint, except that it admits that Bostik's 3180 HM contained mercury and that mercury from the 3180 HM sealant could highlight certain defects in the Heat Mirror film in IGUs, and that its employees took steps to identify alternatives that would prevent such occurrences.

26. Southwall denies the allegations set forth in Paragraph 26 of the Third Amended Complaint. To the extent Paragraph 26 characterizes Exhibit B to the Third Amended Complaint, Southwall states that the document speaks for itself.

27. Southwall denies the allegations set forth in Paragraph 27 of the Third Amended Complaint, except it admits that in the late 1980's it requested that Bostik develop a mercury-free sealant for use in Heat Mirror IGUs and that, in response, Bostik developed its 3190 HM sealant.

28. Southwall denies the allegations set forth in Paragraph 28 of the Third Amended Complaint. To the extent that Paragraph 28 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations.

29. Southwall denies the allegations set forth in Paragraph 29 of the Third Amended Complaint, except it admits that the Technical Data Sheet for Bostik 3190 HM sealant provides that the sealant had a "Service Temperature Range" of minus 40°F to 200°F. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 29 regarding conduct, statements or opinions by Bostik.

30. Southwall denies the allegations set forth in Paragraph 30 of the Third Amended Complaint, except it admits that the Heat Mirror film must be shrunk at high

heat in the manufacturing process and that the sealant system must hold the Heat Mirror film taut.

31. Southwall denies the allegations set forth in Paragraph 31 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of allegations set forth in Paragraph 31 regarding conduct, statements or opinions by Bostik.

32. Southwall denies the allegations set forth in Paragraph 32 of the Third Amended Complaint, except it admits that in the 1980s Southwall representatives may have made a presentation to Wasco representatives regarding Heat Mirror IGUs.

33-35. Paragraphs 33-35 of the Third Amended Complaint were stricken by this Court in its Order, dated August 14, 2003. Therefore, no response by Southwall is required.

36. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 36 of the Third Amended Complaint.

37. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 37 of the Third Amended Complaint.

38. Southwall denies the allegations set forth in Paragraph 38 of the Third Amended Complaint, except that it admits that Four Seasons Solar Solariums ("Four Seasons") was a manufacturer of solariums and greenhouses, that Four Seasons incorporated Heat Mirror film into its solarium and greenhouse IGUs, that Four Seasons

complained to Southwall about what Four Seasons alleged were elevated failure rates of its Heat Mirror units. Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 38 regarding the conduct, statements or opinions of Bostik. To the extent that Paragraph 38 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations.

39. Southwall denies the allegation set forth in Paragraph 39 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 39 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik. To the extent that Paragraph 39 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations. To the extent Paragraph 39 characterizes Exhibit M to the Third Amended Complaint, Southwall states that the document speaks for itself.

40. Southwall denies the allegation set forth in Paragraph 40 of the Third Amended Complaint, except that it admits that its personnel have conducted studies of ultraviolet exposure of IGU sealants, that it formed the Heat Mirror Durability Committee to research means to improve the durability of products using Heat Mirror Film, and that the Heat Mirror Durability Committee

generated reports. To the extent that Paragraph 40 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations. To the extent Paragraph 40 characterizes Exhibit N to the Third Amended Complaint, Southwall states that the document speaks for itself.

41. Southwall denies the allegation set forth in Paragraph 41 of the Third Amended Complaint, except that it admits that Dr. Woodard and Thomas G. Hood applied for a patent for "Seal Guard Edge Tape," which was granted in 1993.

42. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 42 of the Third Amended Complaint.

43. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 43 of the Third Amended Complaint.

44. Southwall denies the allegation set forth in Paragraph 44 of the Third Amended Complaint, except that it admits that its personnel had discussions with Bostik personnel regarding durability of IGU sealants and states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 44 of the third Amended Complaint regarding the conduct, statements or opinions of Bostik.

45. Southwall denies the allegations set forth in Paragraph 45 of the Third Amended Complaint, except that it admits that Bostik 3190 HM is an organic sealant, and that ultraviolet light may degrade organic sealants generally. Southwall further states that it lacks knowledge or information sufficient to form a belief regarding the allegations set forth in Paragraph 45 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

46. Southwall denies the allegations set forth in Paragraph 46 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief regarding the allegations set forth in Paragraph 46 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

47. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 47 of the Third Amended Complaint, except that it admits that Bostik eventually developed a sealant designated "3190 HM UV Enhanced" and/or "3199." Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 47 of the Third Amended Complaint regarding conduct, statements or opinions by Bostik. To the extent Paragraph 47 characterizes Exhibit O to the Third Amended Complaint, Southwall states that the document speaks for itself.

48. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 48 of the Third Amended Complaint regarding conduct, statements or opinions by Bostik.

49. Southwall denies the allegations set forth in Paragraph 49 of the Third Amended Complaint, except that it admits that Exhibit Q to the Third Amended Complaint is a letter from Thomas G. Hood to Richard Owens and Joe Amstock. To the extent Paragraph 49 characterizes Exhibit Q to the Third Amended Complaint, Southwall states that the document speaks for itself.

50. Southwall denies the allegations set forth in Paragraph 50 of the Third Amended Complaint, except that it admits that heat may be a factor in degradation of organic sealants generally.

51. Southwall denies the allegations set forth in Paragraph 51 of the Third Amended Complaint, except that it admits that Exhibit R is a memorandum authored by Dr. Iles, and that its personnel had discussions with Bostik personnel regarding durability of IGU sealants. To the extent Paragraph 51 characterizes Exhibit R to the Third Amended Complaint, Southwall states that the document speaks for itself. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 51 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

52. Southwall denies the allegations set forth in Paragraph 52 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 52 regarding the conduct, statements or opinions of Bostik. To the extent that Paragraph 52 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result,

Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations. To the extent that Paragraph 52 characterizes Exhibits D and I of the Third Amended Complaint, Southwall states that the documents speak for themselves.

53. Southwall denies the allegations set forth in Paragraph 53 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 53 regarding the conduct, statements or opinions of Bostik.

54. Southwall denies the allegations set forth in Paragraph 54 of the Third Amended Complaint, except that it admits that its personnel have conducted tests of sealant for ability to resist creep. To the extent that Paragraph 54 characterizes specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations. In further response, Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 54 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

55. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 55 of the Third Amended Complaint.

56. Southwall denies the allegations set forth in Paragraph 56 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information

sufficient to form a belief as to the allegations set forth in Paragraph 56 regarding the conduct, statements or opinions of Bostik.

57. Southwall denies the allegations set forth in Paragraph 57 of the Third Amended Complaint, except that it admits that, at various times, its personnel have conducted performance testing of sealants. In further response, Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 57 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

58. Southwall denies the allegations set forth in Paragraph 58 of the Third Amended Complaint. In further response, Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 58 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

59. Southwall denies the allegations set forth in Paragraph 59 of the Third Amended Complaint. To the extent Paragraph 59 characterizes Exhibit V to the Third Amended Complaint, Southwall states that the document speaks for itself. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 59 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

60. Southwall denies the allegations set forth in Paragraph 60 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations

set forth in Paragraph 60 of the Third Amended Complaint regarding the conduct, statements or opinions of Wasco or Bostik.

61. Southwall denies the allegations set forth in Paragraph 61 of the Third Amended Complaint. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 61 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

62. Southwall denies the allegations set forth in Paragraph 62 of the Third Amended Complaint, except it admits that it created, patented, and licensed the system for utilizing Heat Mirror film in the manufacture of Heat Mirror IGUs. Southwall further states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 62 of the Third Amended Complaint regarding Wasco's or others' sales of Heat Mirror insulating glass and regarding the conduct, statements or opinions of Bostik.

63. Southwall denies the allegations set forth in Paragraph 63 of the Third Amended Complaint, except it states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 63 of the Third Amended Complaint regarding the conduct, statements or opinions of Wasco or "Ultra" and regarding the conduct, statements or opinions of Bostik. To the extent Paragraph 63 characterizes Exhibits D and H to the Third Amended Complaint, Southwall states that the documents speak for themselves.

64. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations

set forth in Paragraph 64 of the Third Amended Complaint.

65. Southwall lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 65 of the Third Amended Complaint.

66. Southwall denies the allegations set forth in Paragraph 66 of the Third Amended Complaint, except it states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 66 of the Third Amended Complaint regarding the conduct, statements or opinions of Wasco or "Ultra" and regarding the conduct, statements or opinions of Bostik.

67. Southwall denies the allegations set forth in Paragraph 67 of the Third Amended Complaint, except that it states that it lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 67 regarding the conduct, statements or opinions of Bostik.

68. Southwall denies the allegations set forth in Paragraph 68 of the Third Amended Complaint to the extent that Paragraph 68 purports to characterize specific documents, Southwall states that copies of the documents referenced have not been attached to the Third Amended Complaint by Wasco. As a result, Southwall is without knowledge or information sufficient to form a belief as to the truth of such characterizations.

69. Southwall denies the allegations set forth in Paragraph 69 of the Third Amended Complaint.

70. Southwall denies the allegations set forth in Paragraph 70 of the Third Amended Complaint.

71. Paragraph 71 contains the Plaintiff's own characterization of its Third Amended Complaint and does not require a response.

72. Southwall states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 72 of the Third Amended Complaint regarding the conduct, statements or opinions of Bostik.

73. Southwall denies the allegations set forth in Paragraph 73 of the Third Amended Complaint, except it admits that Southwall entered into a settlement in the action captioned *McKernan v. Black & Decker Corp., et. al.*, and states that the settlement documents speak for themselves.

74. Southwall denies the allegations set forth in Paragraph 74 of the Third Amended Complaint (including those asserted in each subpart of Paragraph 74). Southwall further states that to the extent the allegations set forth in Paragraph 74 of the Third Amended Complaint purport to assert legal conclusions, no response is required.

75. Southwall denies the allegations set forth in Paragraph 75 of the Third Amended Complaint. Southwall anther states that to the extent the allegations set forth in Paragraph 75 of the Third Amended Complaint purport to assert legal conclusions, no response is required.

76. Southwall denies the allegations set forth in Paragraph 76 of the Third Amended Complaint. Southwall Bather states that to the extent the allegations set forth in

Paragraph 76 of the Third Amended Complaint purport to assert legal conclusions, no response is required.

77. Southwall denies the allegations set forth in Paragraph 77 of the Third Amended Complaint. Southwall further states that to the extent the allegations set forth in Paragraph 77 of the Third Amended Complaint purport to assert legal conclusions, no response is required.

78. Defendant Southwall hereby incorporates its responses to Paragraphs 1 though 77 as if fully set forth herein.

79-87. Paragraphs 79-87 of the Third Amended Complaint do not state a claim against Southwall and therefore no response is required.

88-102. Paragraphs 88-102 of the Third Amended Complaint were dismissed pursuant to this Court's Order, dated August 14, 2003. Therefore, no response by Southwall is required.

103. Defendant Southwall hereby incorporates its responses to Paragraphs 1 through 102 as if fully set forth herein.

104. Southwall denies the allegations set forth in Paragraph 104 of the Third Amended Complaint.

105. Southwall denies the allegations set forth in Paragraph 105 of the Third Amended Complaint.

106. Southwall denies the allegations set forth in Paragraph 106 of the Third Amended Complaint.

107. Southwall denies the allegations set forth in Paragraph 107 of the Third Amended Complaint.

108. Defendant Southwall hereby incorporates its responses to Paragraphs 1 through 107 as if fully set forth herein.

109-112. Paragraphs 109-112 do not state a claim against Southwall and therefore no response is required.

113. Defendant Southwall hereby incorporates its responses to Paragraphs 1 through 112 as if fully set forth herein.

114. Paragraph 114 contains the Plaintiff's own characterization of its Third Amended Complaint and does not require a response.

115. Southwall denies the allegations set forth in Paragraph 115 of the Third Amended Complaint.

116. Southwall denies the allegations set forth in Paragraph 116 of the Third Amended Complaint (including those asserted in each subpart of Paragraph 116).

117. Southwall denies the allegations set forth in Paragraph 117 of the Third Amended Complaint.

118. Defendant Southwall hereby incorporates its responses to Paragraphs 1 through 117 as if fully set forth herein.

119. Paragraph 119 contains the Plaintiff's own characterization of its Third Amended Complaint and does not require a response.

120. Southwall denies the allegations set forth in Paragraph 120 of the Third Amended Complaint.

121. Southwall denies the allegations set forth in Paragraph 121 of the Third Amended Complaint (including

each subpart of Paragraph 121 of the Third Amended Complaint).

122. Southwall denies the allegations set forth in Paragraph 122 of the Third Amended Complaint.

123. Defendant Southwall hereby incorporates its responses to Paragraphs 1 through 122 as if fully set forth herein.

124. Paragraph 124 contains the Plaintiff's own characterization of its Third Amended Complaint and does not require a response.

125. Southwall denies the allegations set forth in Paragraph 125 of the Third Amended Complaint.

126. Southwall denies the allegations set forth in Paragraph 126 of the Third Amended Complaint (including each subpart of Paragraph 126 of the Third Amended Complaint).

127. Southwall denies the allegations set forth in Paragraph 127 of the Third Amended Complaint.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof that it would not otherwise bear under the applicable law, Southwall asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable Statutes of Limitations, including but not limited to Section 17208 of the California Business and Professions Code and

all applicable limitations in Part 2, Title 2, Chapter 3 of the Code of Civil Procedure.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted against Southwall.

THIRD AFFIRMATIVE DEFENSE

If Plaintiff was harmed at all, such harm, on information and belief, was caused by Plaintiff or its representatives or by other parties over which Southwall has no control and for which Southwall has no responsibility.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the fact that Wasco lacks standing to bring this action.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's recovery, if any, should be reduced or eliminated to the extent that Plaintiff has failed to take action reasonably necessary to mitigate its alleged damages.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of estoppel and waiver.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages are bared [sic] as a matter of law by the settlement of the related class action captioned *McKernan v. Black & Decker Corp., et al.*, Santa Clara Superior Court Case No. CV772488, and the releases given therein.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims under California Business and Professions Code Sections 17200 and 17500 are barred insofar as those statutes, on their face and as applied, violate the United States Constitution, including but not limited to the Due Process clause of the Fourteenth Amendment and the Constitution of the State of California, including but not limited to Section 7 of Article I.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims under California Business and Professions Code Sections 17200 and 17500 *et seq.* are barred to the extent that any alleged representations amounted to mere puffery.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims under California Business and Professions Code Sections 17200 and 17500 *et seq.* are barred to the extent that Southwall substantiated any

alleged representations prior to disseminating them, in accordance with Sections 5 of the FTC Act.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims under California Business and Professions Code Sections 17500 *et seq.* for false advertising are barred to the extent that any alleged representations were not false in the context in which they were made in accordance with Section 5 of the FTC Act.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims under California Business and Professions Code Sections 17200 and 17500 *et seq.* are moot.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's attempt to bring a representative action under California Business and Professions Code Sections 17200 and 17500 *et seq.* is improper insofar as plaintiff is not competent to bring such a representative action and has not otherwise met the requirements to act in a representative capacity.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred, in whole or in part, to the extent that Southwall acted in good faith.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred, in whole or in part, by the doctrines of *in pari delicto* and/or unclean hands.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claim for relief based on negligence is barred by the economic loss doctrine.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred because this Court lacks subject matter jurisdiction over the action.

ADDITIONAL AFFIRMATIVE DEFENSES

Southwall reserves its right to supplement these affirmative defenses as the record is developed through discovery.

WHEREFORE, Defendant Southwall Technologies, Inc., demands relief and judgment as follows:

a. dismissal of the Third Amended Complaint with prejudice as against it;

b. award to Southwall of its costs and disbursements; and

c. such other and further relief as the Court may deem just and proper.

Date: September 11, 2003

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DEMAND FOR JURY TRIAL

Defendant Southwall Technologies, Inc. hereby demands a jury trial on all claims for which a jury trial is available, pursuant to Rule 38 of the Federal Rules of Civil Procedure and Local Rule 3-6(a).

Date: September 11, 2003

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UNITED STATES FEDERAL DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WASCO PRODUCTS, INC. Plaintiff v. SOUTHWALL TECHNOLOGIES, INC. and BOSTIK, INC., Defendants.	Case No.: C 02 2926 SBA ARB (And Related Case Nos. C-97-3701 and C-00-3820) **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT BOSTIK FINDLEY, INC., TO PLAINTIFF'S THIRD AMENDED COMPLAINT FOR DAMAGES** **DEMAND FOR JURY TRIAL** Before Hon. Saundra B. Armstrong

ANSWER

Defendant Bostik Findley, Inc. ("Bostik Findley"), files this Answer to the Third Amended Complaint of Plaintiff Wasco Products, Inc. ("Wasco"). In response to the Third Amended Complaint, Bostik Findley admits, denies, and alleges as follows:

1. Bostik Findley admits only that this is a civil action between citizens of different states and that Wasco contends that the amount in controversy exceeds $75,000 exclusive of interest and costs. Bostik Findley is without knowledge or information sufficient to form a belief as to whether the Court has original jurisdiction over all of Plaintiff's claims and therefore denies the remainder of the allegations contained in Paragraph 1 of the Third Amended Complaint and leaves all questions of law to the Court.

2. Bostik Findley admits the allegations contained in Paragraph 2 of the Third Amended Complaint.

3. Bostik Findley is without knowledge or information sufficient to form a belief as to the locations of the principal place of business and corporate registration of codefendant Southwall Technologies Inc. ("Southwall"), and therefore denies the allegations contained in Paragraph 3 of the Third Amended Complaint.

4. Bostik Findley admits only the allegations contained in the first sentence of Paragraph 4 of the third Amended Complaint. Bostik Findley denies the allegations contained in the second and third sentences of Paragraph 4 of the Third Amended Complaint.

5. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations that "[v]enue is proper pursuant to 28 U.S.C. § 1391, as defendant Southwall is incorporated under the laws of the State of California with its principal place of business in Palo Alto, California[,]" and therefore denies the allegations. Bostik Findley denies the allegations that it has "purposely availed [itself] of the benefit and protections of the State of California and/or [has] had

sufficient contact with this District such that the maintenance of this action is consistent with the principles of due process" and leaves all questions of law to the Court. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations that codefendant Southwall has "purposely availed [itself] of the benefit and protections of the State of California and/or [has] had sufficient contact with this District such that the maintenance of this action is consistent with the principles of due process" and therefore denies the allegations and leaves all questions of law to the Court.

6. Bostik Findley is without knowledge or information sufficient to form a belief as to whether the principal place of business of codefendant Southwall was at all relevant times Palo, Alto, California, and the location of Southwall's incorporation and therefore denies the allegations contained in Paragraph 6 of the Third Amended Complaint.

7. Bostik Findley denies that this is a certified class action; denies that any class may properly be certified or maintained; denies that there are any pending claims against Bostik Findley for fraud, concealment, or negligence; and on the foregoing bases denies all the allegations contained in Paragraph 7 of the Third Amended Complaint.

8. Bostik Findley admits only the allegation that "films ranging from HM 88 down to HM 22" "were developed," as alleged in Paragraph 8 of the Third Amended Complaint. Bostik Findley is otherwise without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 8 of the

Third Amended Complaint and therefore denies the allegations.

9. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 9 of Third Amended Complaint and therefore denies the allegations. Bostik Findley denies the allegation in said Paragraph 9 that "[t]he Heat Mirror IGUs are heated to approximately 200° F for approximately one hour." In fact that allegation is contradicted elsewhere in the Third Amended Complaint (¶ 30). Bostik Findley admits the remaining allegations contained in Paragraph 9 of the Third Amended Complaint.

10. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 10 of the Third Amended Complaint and therefore denies the allegations.

11. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 11 of the Third Amended Complaint and therefore denies the allegations.

12. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 12 of the Third Amended Complaint and therefore denies the allegations and leaves all questions of law to the Court.

13. Bostik Findley admits that, in his July 1990 article in Glass Magazine, Joe Amstock, Bostik Findley's former Product Manager for insulating glass sealants stated that polysulfides had a service temperature range from -20° Fahrenheit to 200° Fahrenheit. Bostik Findley

denies that Mr. Amstock published this article in his capacity as a Bostik Findley representative. Bostik Findley denies the allegation contained in Paragraph 13 of the Third Amended Complaint that, in this July 1990 article, Mr. Amstock stated that polysulfides had a lifetime of 25 years. The fourth sentence of said Paragraph 13 contains insufficient details for Bostik Findley to form a belief as to the truth or falsity of the allegations therein and therefore Bostik Findley denies the allegations. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of all remaining allegations contained in Paragraph 13 of the Third Amended Complaint and therefore denies the allegations.

14. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the Third Amended Complaint and therefore denies the allegations.

15. Bostik Findley admits only the allegation that it individually manufactured a polyurethane sealant (3180) for use in manufacturing standard insulating glass units. Bostik Findley denies that it was ever a joint venturer with Southwall, either in the development of IGU sealants or otherwise. Bostik Findley denies the remaining allegations contained in Paragraph 15 of the Third Amended Complaint.

16. Bostik Findley denies each and every other allegation in Paragraph 16 of the Third Amended Complaint, except that Bostik Findley admits only that Steve Vincent visited Bostik Findley's facilities in Huntington Valley, Pennsylvania.

17. Bostik Findley admits only the allegation that Southwall approved the 3180 HM sealant in a single seal

application, as alleged in Paragraph 17 of the Third Amended Complaint. Bostik Findley denies that this approval resulted from joint efforts of Bostik Findley and Southwall. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 17 of the Third Amended Complaint and therefore denies the allegations.

18. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 18 of the Third Amended Complaint and therefore denies the allegations.

19. The first sentence of Paragraph 19 of the Third Amended Complaint is unintelligible and therefore Bostik Findley denies the allegations contained therein. Bostik Findley admits that Southwall qualified 3180 HM in a single seal configuration in or about 1985. The remaining allegations in Paragraph 19 of the Third Amended Complaint are vague and ambiguous, and therefore Bostik Findley denies the allegations.

20. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 20 of the Third Amended Complaint and therefore denies the allegations.

21. Bostik Findley denies the allegations contained in Paragraph 21 of the Third Amended Complaint.

22. Bostik Findley admits only the allegations that some of its Technical Data Specification Sheets for its polyurethane sealants indicated that the sealants had a "service temperature range" of -40° F to 200° F, and that Mr. Amstock was employed as the Business Manager for

sealants for Bostik Findley, Inc., when he published an article in the July 1990 issue of Glass Magazine. Bostik Findley denies that Mr. Anstock published this article in his capacity as a Bostik Findley employee or that the article was approved or authorized by Bostik Findley. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth of the allegation that it never published or distributed a data specification sheet for Bostik Findley polyurethane insulating glass sealant which did not make the representation that the sealants had a "service temperature range" of -40° F to 200° F and therefore denies the allegation. Bostik Findley denies the remaining allegations contained in Paragraph 22 of the Third Amended Complaint.

23. Bostik Findley denies the allegations contained in Paragraph 23 of the Third Amended Complaint.

24. Bostik Findley denies the allegations contained in Paragraph 24 of the Third Amended Complaint.

25. Bostik Findley denies that 3180 HM contained "undesirable metal materials" as alleged in Paragraph 25 of the Third Amended Complaint. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 25 of the Third Amended Complaint and therefore denies the allegations.

26. Bostik Findley denies the allegations contained in Paragraph 26 of the Third Amended Complaint.

27. Bostik Findley denies the allegations contained in Paragraph 27 of the Third Amended Complaint.

28. Bostik Findley denies that "Exhibit I" identifies the purpose of 3190 HM as solely related to use in Heat

Mirror IGUs, or that "[i]t is not to be used for other window fabrications" and "it has no other application" or purpose. Bostik Findley denies all other allegations contained in Paragraph 28 of the Third Amended Complaint.

29. Bostik Findley admits the allegations in the first sentence of Paragraph 29 of the Third Amended Complaint, to the best of Bostik Findley's knowledge, information, and belief. Bostik Findley denies the allegations in the second sentence of Paragraph 29 of the Third Amended Complaint.

30. Bostik Findley admits only that Southwall prescribes that Heat Mirror film shall be shrunk for one hour at 205° F to 215° F. Bostik Findley denies the remaining allegations contained in Paragraph 30 of the Third Amended Complaint.

31. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Mr. Amstock knew that polysulfides had an accepted ability to operate in environments with high temperatures reaching 200° F and therefore denies the allegation. Bostik Findley denies that Mr. Amstock published any article in his capacity as a Bostik Findley employee or that Bostik Findley authorized or approved the publication of such article. Bostik Findley denies the remaining allegations contained in Paragraph 31 of the Third Amended Complaint.

32. Bostik Findley denies that Southwall made presentations to Wasco on behalf of Bostik Findley. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 32 of the Third

Amended Complaint and therefore denies the allegations. The allegation, "Wasco skylights an application which by design generates temperatures in excess of 160°F," is vague and ambiguous and on that further basis Bostik Findley denies the allegation.

33. Paragraph 33 of the Third Amended Complaint was a stricken by this Court in its Order, dated August 14, 2003. Therefore, no response by Bostik Findley is required.

34. Paragraph 34 of the Third Amended Complaint was a stricken by this Court in its Order, dated August 14, 2003. Therefore, no response by Bostik Findley is required.

35. Paragraph 35 of the Third Amended Complaint was a stricken by this Court in its Order, dated August 14, 2003. Therefore, no response by Bostik Findley is required.

36. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 36 of the Third Amended Complaint and therefore denies the allegations.

37. Bostik Findley admits the allegation that Wasco did not purchase Bostik's Heat Mirror or "HM" polyurethane. Bostik Findley denies the remainder of the allegations contained in Paragraph 37 of the Third Amended Complaint.

38. Paragraph 38 of the Third Amended Complaint violates Rule 10(b) of the Federal Rules of Civil Procedure in that its contents are not limited to a statement of a single set of circumstances but rather purport to make allegations about numerous purported circumstances concerning at least four entities in addition to both defendants. Moreover, most of the allegations in Paragraph 38 are also vague and ambiguous. On these bases, Bostik

Findley denies the allegations in Paragraph 38. To the extent a more specific response may be required to the allegations in Paragraph 38 of the Third Amended Complaint, Bostik Findley responds further as follows: Bostik Findley denies the allegations contained in the *first sentence* of Paragraph 38, although admits that a company named Four Seasons Solar Products Corp. reported alleged elevated failures of Heat Mirror units in 1990. Bostik Findley lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the *second sentence* of Paragraph 38 and therefore denies the allegations. Bostik Findley denies the allegations in the *third sentence* of Paragraph 38, although admits that a company named Four Seasons Solar Products Corp. complained about alleged elevated failures of Heat Mirror units in 1990. With respect to the *fourth sentence* of Paragraph 38, Bostik Findley denies knowledge or information sufficient to form a belief as to the truth or falsity of the alleged activities by Southwall and therefore denies those allegations; admits only that all of the failed Four Seasons Solar Products Corp. units examined by Bostik Findley failed due to improper design, glazing, manufacture, and/or installation of the units; and denies all of the other allegations in the *fourth sentence* of Paragraph 38. Bostik Findley denies the allegations contained in the *fifth sentence* of Paragraph 38. Bostik Findley denies knowledge or information sufficient either to understand or to form a belief as to the truth or falsity of the allegations in the *sixth sentence* of Paragraph 38 and on those bases denies the allegations. Bostik Findley denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in *seventh sentence* and *eighth sentence* of Paragraph 38 and therefore denies the allegations. With respect to the allegations

in the *ninth sentence* of Paragraph 38, Bostik Findley admits that Northwest Aluminum units inspected by Bostik Findley had failed due to the presence of Lucor Powder on the glass and/or due to other defects in the manufacturing and installation of the units and that Bostik Findley communicated this to Northwest Aluminum; denies knowledge or information sufficient to form a belief as to the existence or cause of failures in Northwest Aluminum's units not inspected by Bostik Findley; and denies all other allegations in the *ninth sentence* of Paragraph 38.

39. Bostik Findley denies knowledge or information sufficient to form a belief as to the allegations contained in the first, second, and third sentences of Paragraph 39 of the Third Amended Complaint and therefore denies the allegations. With respect to the fourth sentence in Paragraph 39, Bostik Findley admits only that it lacked any liability or culpability for failures of Heat Mirror units experienced by a company named Four Seasons Solar Products Corp.; that each and every failed Four Seasons Solar Products Corp. unit inspected by Bostik Findley failed due to improper design, glazing, manufacture, and/or installation of the units; and that Bostik Findley communicated the same to Four Seasons Solar Products Corp. Bostik Findley denies all of the other allegations in the fourth sentence of Paragraph 39.

40. Bostik Findley denies the allegation that Southwall told Bostik Findley representatives about any supposed evidence of sealant failure as alleged in the last sentence of Paragraph 40 of the Third Amended Complaint. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 40 of the

Third Amended Complaint and therefore denies the allegations.

41. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 41 of the Third Amended Complaint and therefore denies the allegations.

42. The first sentence of Paragraph 42 of the Third Amended Complaint is vague and ambiguous in its use of the term "indirect solar exposure," and the context in which the Third Amended Complaint uses the term evinces that Wasco lacks an understanding of the meaning of the term. Therefore, Bostik Findley denies the allegations in the first sentence of Paragraph 42. Bostik Findley also denies all of the remaining allegations contained in Paragraph 42 of the Third Amended Complaint.

43. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 43 of the Third Amended Complaint and therefore denies the allegations. Bostik Findley denies that Mr. Amstock was an employee of Bostik Findley when his book was published in 1997 or that Mr. Lowe was ever an agent or employee of Bostik Findley. Bostik Findley denies that it authorized publication of their book or any other publication by Mr. Amstock. Paragraph 43 also evinces a misunderstanding by Wasco of the term "indirect light," rendering Paragraph 43 vague and ambiguous, and Bostik Findley denies the allegations contained in Paragraph 43 on that further basis as well.

44. Bostik Findley denies the allegations contained in Paragraph 44 of the Third Amended Complaint.

45. Bostik Findley admits only the allegation that it and Southwall knew (as is generally known) that exposure to solar radiation including ultraviolet light degrades organic sealants as well as all other organic materials on earth. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth of the remaining allegation, which constitutes an incomplete hypothetical, that "[i]t is a general rule of thumb that oxidative reactions, like other chemical reactions, double as temperature is increased by 10° C[,]" as alleged in Paragraph 45 of the Third Amended Complaint, and therefore denies the allegation. Bostik Findley denies the remaining allegations contained in Paragraph 45 of the Third Amended Complaint

46. Bostik Findley denies that its "engineers recognized that u.v. piping was occurring and could damage the organic Bostik Findlay polyurethane sealant in a Heat Mirror IGU." To the contrary, Bostik Findley does not believe that the alleged theory referred to by Wasco as "piping" or "tunneling" has any validity or that it constitutes the reason for the failure of any insulated glass unit inspected by Bostik Findley. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in Paragraph 46 of the Third Amended Complaint and on this basis denies the allegations.

47. Bostik Findley denies the allegations contained in the first, second, and fourth, sixth, seventh, and eighth sentences of Paragraph 47 of the Third Amended Complaint. Bostik Findley notes that Wasco misquotes and mischaracterizes Exhibit O to the Third Amended Complaint. Bostik Findley admits the allegations contained in the third sentence of Paragraph 47. The fifth sentence of

Paragraph 47 is vague and ambiguous in its use of the term "the indirect u.v. exposure and heat" and therefore Bostik Findley denies the allegations in said fifth sentence.

48. Bostik Findley denies the allegations contained in Paragraph 48 of the Third Amended Complaint.

49. Bostik Findley denies all of the allegations in Paragraph 49 of the Third Amended Complaint, although admits only that "Thomas G. Hood wrote to Richard Owens and Joe Amstock at Bostik Findley" on or about August 20, 1990, regarding Seal Guard™ edge tape; and denies knowledge or information sufficient to form a belief as to what Southwall or Mr. Hood did or did not communicate to the manufacturers or distributors of Heat Mirror insulating glass. Bostik Findley specifically denies the allegation that Exhibit Q (which Wasco misquotes) "memorialized [an] understanding" that 3190 HM was "deficient" or that "a change to 3190 HM U.V. Enhanced (3199) and the addition of a strip of u.v. absorbing Seal Guard Edge Tape developed to absorb u.v. were necessary for Heat Mirror units to survive long term in the field."

50. Bostik Findley denies the allegations contained in Paragraph 50 of the Third Amended Complaint.

51. Bostik Findley denies the allegations contained in Paragraph 51 of the Third Amended Complaint, which is based on Wasco's mischaracterization and misquotation of Exhibit R to the Third Amended Complaint.

52. Bostik Findley denies the allegations in Paragraph 52 of the Third Amended Complaint, but admits only that, to the best of its knowledge, information, and

belief, all product data sheets for its polyurethane sealants reported a service temperature range of -40° F to 200° F.

53. Bostik Findley denies the allegations in Paragraph 53 of the Third Amended Complaint.

54. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations that "[o]n December 14, 1990, Southwall produced testing results that, as Mr. Louis Lau (Southwall engineer) writes, 'unfortunately' demonstrate that after only one (1) hour of exposure to sunlight at 107° F the sealant reached 208° F" and therefore denies the allegations. The Third Amended Complaint does not attach the document it purports to quote. In light of Wasco's repeated misquotation and mischaracterization of documents throughout the Third Amended Complaint, it is likely that Wasco misuses this document as well. Bostik Findley denies all of the remaining allegations contained in Paragraph 54 of the Third Amended Complaint.

55. Bostik Findley denies the allegations contained in Paragraph 55 of the Third Amended Complaint.

56. Bostik Findley denies the allegations contained in Paragraph 56 of the Third Amended Complaint.

57. Bostik Findley denies the allegations contained in Paragraph 57 of the Third Amended Complaint.

58. Bostik Findley denies the allegations contained in the first sentence of Paragraph 58 of the Third Amended Complaint. The allegations in the third sentence of Paragraph 58 are unintelligible, and therefore Bostik Findley denies the allegations. The third sentence of Paragraph 58 also mischaracterizes the cited exhibit to the Third Amended Complaint, and Bostik Findley therefore

denies the allegations in the third sentence therefore as well. Bostik Findley denies all other allegations in Paragraph 58.

59. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth of the allegation that "[c]onsistent with its indifference to the realities of temperature induced seal failures, Southwall advertised the Heat Mirror installation at the Gibson home in Blackhawk, California" and therefore denies the allegation. Bostik Findley denies the remaining allegations contained in Paragraph 59 of the Third Amended Complaint.

60. Bostik Findley denies the allegations contained in Paragraph 60 of the Third Amended Complaint.

61. Bostik Findley denies the allegations contained in Paragraph 61 of the Third Amended Complaint.

62. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 62 of the Third Amended Complaint and therefore denies the allegations.

63. The first sentence of Paragraph 63 of the Third Amended Complaint is unintelligible, vague, and ambiguous, and therefore Bostik Findley denies the allegations contained therein. Bostik Findley denies the allegations contained in the second sentence of Paragraph 63. In addition, Bostik Findley denies knowledge or information sufficient to form a belief as to what, if anything, Southwall urged "every manufacturer" to do. Bostik Findley denies the allegations contained in the third sentence of Paragraph 63, except that Bostik Findley admits that Ultra Glass supplied Wasco with Heat Mirror insulated glass containing 3190 HM. The remaining allegations in

Paragraph 63 are vague, ambiguous, and unintelligible, and therefore Bostik Findley denies the allegations.

64. The allegation that "Bostik representatives repeatedly informed manufacturers that polyurethanes such as 3190 HM were superior to polysulfide sealant 'for MVT (moisture vapor transmission)' and were physically stronger" is vague and ambiguous, and Bostik Findley therefore denies the allegation. Bostik Findley denies the remaining allegations contained in Paragraph 64 of the Third Amended Complaint.

65. The first sentence of Paragraph 65 of the Third Amended Complaint is vague and ambiguous, and Bostik Findley therefore denies the allegations contained therein. Bostik Findley denies the remaining allegations contained in Paragraph 65 of the Third Amended Complaint.

66. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 66 and therefore denies the allegations.

67. Bostik Findley denies the allegations contained in Paragraph 67 of the Third Amended Complaint.

68. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 68 and therefore denies the allegations.

69. Bostik Findley denies the allegations contained in Paragraph 69 of the Third Amended Complaint.

70. Bostik Findley denies the allegations contained in Paragraph 70 of the Third Amended Complaint.

71. Bostik Findley admits only the allegation that Wasco brings this action. Bostik Findley denies the [sic] that the action is appropriate for class certification as alleged in Paragraph 71 of the Third Amended Complaint.

72. Bostik Findley admits the allegations contained in the first three sentences of Paragraph 72 of the Third Amended Complaint, however points out that Wasco's purported quotation is inaccurate. Bostik Findley denies knowledge or information sufficient to form a belief as to the truth of falsity of the allegations contained the fourth sentence of Paragraph 72 and therefore denies the allegations.

73. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 73 and therefore denies the allegations.

74. Bostik Findley denies that this is a certified class action or that it can be maintained as a class action. Bostik Findley denies that this action satisfies the numerosity, commonality, typicality, adequacy and superiority requirements mandated by F.R.C.P. 23.

a. Bostik Findley denies that individual joinder would be impracticable or that any putative class would exceed twenty-five (25) members.

b. Bostik Findley denies that common questions of law and fact exist as to all putative class members or predominate over any question that affects only individual putative members, and, on this basis, denies all allegations made in Subparagraphs (1)-(14), inclusive.

75. Bostik Findley denies the allegations contained in Paragraph 75 of the Third Amended Complaint.

76. Bostik Findley denies the allegations contained in Paragraph 76 of the Third Amended Complaint.

77. Bostik Findley denies the allegations contained in Paragraph 77 of the Third Amended Complaint.

FIRST CLAIM FOR RELIEF

(Breach of Express Warranty Against Bostik Findley)

78. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 77 above as if they were fully set forth herein.

79. Bostik Findley is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in the first four sentences of Paragraph 79 of the Third Amended Complaint and therefore denies the allegations. The fifth sentence of Paragraph 79 is vague and ambiguous, and Bostik Findley therefore denies the allegations contained therein. The sixth sentence of Paragraph 79 is unintelligible, and Bostik Findley therefore denies the allegations contained therein.

80. Bostik Findley denies the allegations contained in Paragraph 80 of the Third Amended Complaint.

81. Bostik Findley denies the allegations contained in Paragraph 81 of the Third Amended Complaint.

82. Bostik Findley denies the allegations contained in Paragraph 82 of the Third Amended Complaint.

83. Bostik Findley denies the allegations contained in Paragraph 83 of the Third Amended Complaint.

84. Bostik Findley admits only the allegation that Wasco counsel sent a letter to Mike Hoban dated May 1, 2000 (which Wasco misquotes) purporting to inform Mr. Hoban of alleged losses in excess of $100,000 and allegedly continuing monthly. Bostik Findley denies the remaining allegations contained in Paragraph 84 of the Third Amended Complaint.

85. Bostik Findley denies that "Wasco gave notice of the defect in Bostik's polyurethane sealant" and admits the remainder of the allegations in the first sentence of Paragraph 85 of the Third Amended Complaint. Bostik Findley denies the remaining allegations contained in Paragraph 85.

86. Bostik Findley denies the allegations contained in Paragraph 86 of the Third Amended Complaint.

87. Bostik Findley denies the allegations contained in Paragraph 87 of the Third Amended Complaint.

SECOND CLAIM FOR RELIEF

(Fraud – Intentional Misrepresentation Against Southwall and Bostik Findley)

88-102. This claim was dismissed with prejudice by the Court in its Order dated August 14, 2003. For this and other reasons, Bostik Findley denies all allegations contained in Paragraphs 88 through 102 of the Third Amended Complaint.

THIRD CLAIM FOR RELIEF

(Negligence Against Southwall)

103. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 102 above as if they were fully set forth herein.

104. Bostik Findley is without knowledge or information sufficient to form a belief as to what Southwall knew and/or believed, as alleged in Paragraph 104 of the Third Amended Complaint, and therefore denies the allegations contained in Paragraph 104. Bostik Findley specifically denies the allegations contained in the third and fourth sentences of Paragraph 104.

105. Bostik Findley denies the allegations contained in Paragraph 105 of the Third Amended Complaint.

106. Bostik Findley denies the allegations contained in Paragraph 106 of the Third Amended Complaint.

107. Bostik Findley denies the allegations contained in Paragraph 107 of the Third Amended Complaint.

FOURTH CLAIM FOR RELIEF

(Strict Products Liability Against Bostik Findley)

108. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 107 above as if they were fully set forth herein.

109. Bostik Findley admits the allegations contained in the first sentence of Paragraph 109 of the Third Amended Complaint. The second sentence of Paragraph

109 is vague and ambiguous, and Bostik Findley therefore denies the allegations contained therein.

110. Bostik Findley denies the allegations contained in Paragraph 110 of the Third Amended Complaint.

111. Bostik Findley denies the allegations contained in Paragraph 111 of the Third Amended Complaint.

112. Bostik Findley denies the allegations contained in Paragraph 112 of the Third Amended Complaint.

FIFTH CLAIM FOR RELIEF FOR UNFAIR BUSINESS PRACTICES

(Against Bostik Findley and Southwall)

113. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 112 above as if they were fully set forth herein.

114. Bostik Findley admits only the allegation that Wasco brings this claim for relief in its individual capacity as alleged in Paragraph 114 of the Third Amended Complaint. It is inappropriate for Wasco to bring this claim for relief on behalf of the alleged "manufacturing and distributing classes" or "on behalf of the general public," and Bostik Findley therefore denies the remaining allegations contained in Paragraph 114 of the Third Amended Complaint.

115. Bostik Findley denies the allegations contained in Paragraph 115 of the Third Amended Complaint.

116. Bostik Findley denies the allegations contained in Paragraph 116 and all Subparagraphs a-e, inclusive, of the Third Amended Complaint.

117. Bostik Findley denies the allegations contained in Paragraph 117 of the Third Amended Complaint.

SIXTH CLAIM FOR RELIEF FOR UNFAIR BUSINESS PRACTICES

(Against Southwall)

118. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 117 above as if they were fully set forth herein.

119. Bostik Findley admits only the allegation that Wasco brings this claim for relief in its individual capacity as alleged in Paragraph 119 of the Third Amended Complaint. It is inappropriate for Wasco to bring this claim for relief on behalf of the alleged "manufacturing and distributing classes" or "on behalf of the general public," and Bostik Findley therefore denies the remaining allegations contained in Paragraph 119 of the Third Amended Complaint.

120. Bostik Findley denies the allegations contained in Paragraph 120 of the Third Amended Complaint.

121. Bostik Findley denies the allegations contained in Paragraph 121 and all Subparagraphs a-d, inclusive, of the Third Amended Complaint.

122. Bostik Findley denies the allegations contained in Paragraph 122 of the Third Amended Complaint.

SEVENTH CLAIM FOR RELIEF FOR FALSE OR MISLEADING BUSINESS PRACTICES

(Against Defendants Bostik Findley and Southwall)

123. Bostik Findley admits and denies the allegations contained herein by incorporating by reference Bostik Findley's responses in Paragraphs 1 through 122 above as if they were fully set forth herein.

124. Bostik Findley admits only the allegation that Wasco brings this claim for relief in its individual capacity as alleged in Paragraph 124 of the Third Amended Complaint. It is inappropriate for Wasco to bring this claim for relief on behalf of the alleged "manufacturing and distributing classes" or "on behalf of the general public," and Bostik Findley therefore denies the remaining allegations contained in Paragraph 124 of the Third Amended Complaint.

125. Bostik Findley denies the allegations contained in Paragraph 125 of the Third Amended Complaint.

126. Bostik Findley denies the allegations contained in Paragraph 126 and all Subparagraphs a-e, inclusive, of the Third Amended Complaint.

127. Bostik Findley denies the allegations contained in Paragraph 127 of the Third Amended Complaint.

PRAYER FOR RELIEF

128. Bostik Findley denies the allegations contained in Paragraph 1 of the Prayer for Relief in the Third Amended Complaint.

129. Bostik Findley denies the allegations contained in Paragraph 2 of the Prayer for Relief in the Third Amended Complaint.

130. Bostik Findley denies the allegations contained in Paragraph 3 of the Prayer for Relief in the Third Amended Complaint.

131. Bostik Findley denies the allegations contained in Paragraph 4 of the Prayer for Relief in the Third Amended Complaint.

132. Bostik Findley denies the allegations contained in Paragraph 5 of the Prayer for Relief in the Third Amended Complaint.

133. Bostik Findley denies the allegations contained in Paragraph 6 of the Prayer for Relief in the Third Amended Complaint.

134. Bostik Findley denies the allegations contained in Paragraph 7 of the Prayer for Relief in the Third Amended Complaint.

135. Bostik Findley denies the allegations contained in Paragraph 8 of the Prayer for Relief in the Third Amended Complaint.

136. Bostik Findley denies the allegations contained in Paragraph 9 of the Prayer for Relief in the Third Amended Complaint.

137. Bostik Findley denies the allegations contained in Paragraph 10 of the Prayer for Relief in the Third Amended Complaint.

138. Bostik Findley denies the allegations contained in Paragraph 11 of the Prayer for Relief in the Third Amended Complaint.

139. Bostik Findley denies the allegations contained in Paragraph 12 of the Prayer for Relief in the Third Amended Complaint.

To the extent that through oversight the foregoing Answer may not respond to any particular allegation(s) made by Wasco in the Third Amended Complaint, Bostik Findley hereby denies such allegations and requests that such allegation(s) be brought to its attention for its further consideration.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof that it would not otherwise bear under the applicable law, Bostik Findley asserts the following affirmative defenses:

First Affirmative Defense as to All Claims

(Failure to State a Claim)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein fail to state a claim upon which relief can be granted.

Second Affirmative Defense as to Each Claim

(Statutes of Limitations)

The first claim of the Third Amended Complaint for relief based on breach of express warranty asserted

against Bostik Findley is barred by the provisions of California Code of Civil Procedure Section 339, California Commercial Code Section 2103, California Commercial Code Section 2725, and/or any and all other statute(s) of limitations applicable to such claim.

The fourth claim of the Third Amended Complaint for relief based on strict products liability asserted against Bostik Findley is barred by the provisions of California Code of Civil Procedure Section 338(c) and/or any and all other statute(s) of limitations applicable to such claim.

The fifth claim of the Third Amended Complaint for relief based on unfair business practices asserted against Bostik Findley is barred by the provisions of California Business & Professions Code Section 17208 and/or any and all other statute(s) of limitations applicable to such claim.

The seventh claim of the Third Amended Complaint for relief based on false or misleading business practices asserted against Bostik Findley is barred by the provisions of California Code of Civil Procedure Section 338 and/or any and all other statute(s) of limitations applicable to such claim.

Third Affirmative Defense as to All Claims

(Wasco Lacks Standing)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein are barred by the fact that Wasco lacks standing to bring this action. Wasco has neither alleged that it purchased 3190 HM from Bostik Findley nor established

standing or any other basis on which it may sue Bostik Findley.

Fourth Affirmative Defense as to All Claims

(Lack of Subject Matter Jurisdiction)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein are barred, in whole or in part, because the Court lacks subject matter jurisdiction over this action.

Fifth Affirmative Defense as to All Claims

(Laches)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein are barred by the doctrine of laches because Wasco had, or should have had, knowledge of all facts constituting its purported claims, yet failed to assert its claims in a timely fashion.

Sixth Affirmative Defense as to All Claims

(Waiver and Estoppel)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein are barred by the doctrines of waiver and estoppel.

Seventh Affirmative Defense as to All Claims

(Inequitable Conduct by Plaintiff)

The Third Amended Complaint and each of the purported claims for relief asserted against Bostik Findley therein are barred by the inequitable conduct of Wasco.

Eighth Affirmative Defense as to All Claims

(Failure to Mitigate)

As to each purported claim for relief asserted against Bostik Findley, Wasco had a legal and equitable duty to act reasonably in order to mitigate damages, if any, arising from the matter alleged in the Third Amended Complaint. Bostik Findley is informed and believes, and on that ground alleges, that Wasco has failed to discharge the duty to mitigate damages. Wasco is thus barred, in whole or in part, from recovery of damages upon any purported claim.

Ninth Affirmative Defense as to All Claims

(McKernan Settlement)

Plaintiff's alleged damages, if any, are limited and/or barred as a matter of law by the settlement reached in the class-action captioned *McKernan v. Black & Decker,* California Superior Court Case Number CV 772488.

Tenth Affirmative Defense as to § 17200 Claim

(Unconstitutionality)

Wasco's incorrect interpretation of California Commercial Code Section 17200 *et seq.* violates the United States Constitution, including but not limited to the Free

Speech clause of the First Amendment, the Due Process clause of the Fourteenth Amendment, and the Commerce clause of Article I, and the Constitution of the State of California, including but not limited to Sections 2 and 7 of Article I.

Eleventh Affirmative Defense as to § 17200 Claim

(Puffing)

The fifth claim of the Third Amended Complaint for relief based on allegedly unfair business practices under California Commercial Code Section 17200 *et seq.* asserted against Bostik Findley is barred because representations that amount to puffery are not actionable in an unfair business practices claim.

Twelfth Affirmative Defense as to § 17200 Claim

(Prior Substantiation)

The fifth claim of the Third Amended Complaint for relief based on allegedly unfair business practices under California Commercial Code Section 17200 *et seq.* asserted against Bostik Findley is barred because, in accord with Section 5 of the FTC Act, Bostik Findley substantiated its claims prior to disseminating them.

Thirteenth Affirmative Defense as to § 17200 Claim

(*In Pari Delicto*/Unclean Hands)

The fifth claim of the Third Amended Complaint for relief based on allegedly unfair business practices under California Commercial Code Section 17200 *et seq.* asserted

against Bostik Findley is barred, in whole or in part, by the doctrines of *in pari delicto* and/or unclean hands.

Fourteenth Affirmative Defense as to § 17200 Claim

(Mootness)

The fifth claim of the Third Amended Complaint for relief based on allegedly unfair business practices under California Commercial Code Section 17200 *et seq.* asserted against Bostik Findley should be dismissed on the grounds of mootness.

Fifteenth Affirmative Defense as to § 17200 Claim

(Adequate Remedy at Law)

The fifth claim of the Third Amended Complaint for relief based on allegedly unfair business practices under California Commercial Code Section 17200 *et seq.* asserted against Bostik Findley is barred because Wasco has an adequate remedy at law.

Sixteenth Affirmative Defense as to § 17500 Claim

(Unconstitutionality)

Wasco's incorrect interpretation of California Commercial Code Section 17500 *et seq.* violates the United States Constitution, including but not limited to the Free Speech clause of the First Amendment, the Due Process clause of the Fourteenth Amendment, and the Commerce clause of Article I, and the Constitution of the State of California, including but not limited to Sections 2 and 7 of Article I.

Seventeenth Affirmative Defense as to § 17500 Claim

(Puffing)

The seventh claim of the Third Amended Complaint for relief based on allegedly false or misleading business practices under California Commercial Code Section 17500 *et seq.* asserted against Bostik Findley is barred because advertising of the type that no reasonable consumer could be misled is not actionable in a claim for misrepresentation.

Eighteenth Affirmative Defense as to § 17500 Claim

(Prior Substantiation)

The seventh claim of the Third Amended Complaint for relief based on allegedly false or misleading business practices under California Commercial Code Section 17500 *et seq.* asserted against Bostik Findley is barred because, in accord with Section 5 of the FTC Act, Bostik Findley substantiated its claims prior to disseminating them.

Nineteenth Affirmative Defense as to § 17500 Claim

(*In Pari Delicto*/Unclean Hands)

The seventh claim of the Third Amended Complaint for relief based on allegedly false or misleading business practices under California Commercial Code Section 17500 *et seq.* asserted against Bostik Findley is barred, in whole or in part, by the doctrines of *in pari delicto* and/or unclean hands.

Twentieth Affirmative Defense as to § 17500 Claim

(Mootness)

The seventh claim of the Third Amended Complaint for relief based on allegedly false or misleading business practices under California Commercial Code Section 17500 *et seq.* asserted against Bostik Findley should be dismissed on the grounds of mootness.

Twenty-First Affirmative Defense as to § 17500 Claim

(Adequate Remedy at Law)

The seventh claim of the Third Amended Complaint for relief based on allegedly false or misleading business practices under California Commercial Code Section 17500 *et seq.* asserted against Bostik Findley is barred because Wasco has an adequate remedy at law.

Twenty-Second Affirmative Defense as to Strict Products Liability Claim

(Economic Loss Doctrine)

The fourth claim of the Third Amended Complaint for relief based on strict products liability is barred by the economic loss doctrine.

Twenty-Third Affirmative Defense as to Strict Products Liability Claim

(Comparative Negligence)

As to the fourth claim of the Third Amended Complaint for relief based on strict products liability, Bostik Findley alleges that Wasco's damages, if any, were caused in whole or in part by its own negligence or the negligence

of its agents, employees or representatives, and any damages must be reduced, abated or eliminated in proportion to such negligence.

Twenty-Fourth Affirmative Defense as to Strict Products Liability Claim

(Third Party Negligence Is a Superseding Cause)

As to the fourth claim of the Third Amended Complaint for relief based on strict products liability, Bostik Findley alleges that, to the extent that Wasco sustained any injury, loss, damage or detriment, the injury, loss, damage or detriment was caused by an independent, superseding cause unrelated to the alleged acts, omission, and/or conduct of Bostik Findley.

Twenty-Fifth Affirmative Defense as to Strict Products Liability Claim

(Unforseeable Misuse of Product)

The fourth claim of the Third Amended Complaint for relief based on strict products liability is barred because, to the extent that Wasco sustained any injury, loss, damage or detriment, the injury, loss, damage or detriment was caused by the unforeseeable misuse of the product by Wasco, its agents, employees, representatives, vendors, customers, or other third parties.

Twenty-Sixth Affirmative Defense as to Strict Products Liability Claim

(Alterations to Product)

The fourth claim of the Third Amended Complaint for relief based on strict products liability is barred because

any defect, if it existed, was created not by Bostik Findley but by subsequent alteration or modification by Wasco or third parties.

Twenty-Seventh Affirmative Defense as to Strict Products Liability Claim

(Benefit of Design)

The fourth claim of the Third Amended Complaint for relief based on strict products liability is barred because Wasco has failed to allege that the risks of the design of Bostik Findley's sealant(s) were not outweighed by the benefits of the design(s).

Twenty-Eighth Affirmative Defense as to Strict Products Liability Claim

(State of the Art)

The fourth claim of the Third Amended Complaint for relief based on strict products liability is barred because no design options superior to those used in Bostik Findley's sealant(s) were available during the relevant time period.

Twenty-Ninth Affirmative Defense as to Express Warranty Claim

(Failure to Give Timely Notice)

The first claim of the Third Amended Complaint for relief based on breach of express warranty is barred because Wasco failed to give timely notice thereof to Bostik Findley.

Additional Affirmative Defenses

Bostik Findley reserves its right to supplement these affirmative defenses based on facts disclosed in discovery or otherwise.

WHEREFORE, Defendant Bostik Findley prays as follows:

1. That Plaintiff take nothing by reason of its complaint;
2. That judgment be rendered in favor of Bostik Findley and against Plaintiff;
3. That Bostik Findley be awarded the costs of suit incurred in defense of this action;

   and

4. For such other and further relief as the Court may deem just and proper.

DATED: September 11, 2003

DAVID R. SCHEIDEMANTLE
TRACY E. AUGUSTINE
NAVID YADEGAR
PROSKAUER ROSE LLP

By: /s/ Tracy E. Augustine
Tracy E. Augustine
Attorneys for Defendant
Bostik Findley, Inc.

DEMAND FOR JURY TRIAL

Defendant Bostik Findley, Inc., hereby demands a jury trial on the Claims asserted by Plaintiff Wasco Products, Inc., as provided by Rule 38 of the Federal Rules of Civil Procedure and Local Rule 3-6(a).

DATED: September 11, 2003

DAVID R. SCHEIDEMANTLE
TRACY E. AUGUSTINE
NAVID YADEGAR
PROSKAUER ROSE LLP

By: /s/ Tracy E. Augustine
Tracy E. Augustine
Attorneys for Defendant
Bostik Findley, Inc.

OPPOSITION BRIEF

No. 05-1518

FILED
JUL 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

WASCO PRODUCTS, INC.,

Petitioner,

v.

SOUTHWALL TECHNOLOGIES, INC., AND BOSTIK-FINDLEY, INC.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT BOSTIK, INC., IN OPPOSITION

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July 21, 2006.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Respondent Bostik, Inc. ("Bostik"), discloses that Bostik is a unit of TOTAL SA, a publicly traded company which has a 10% or more interest in Bostik.

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I. STATEMENT OF THE CASE

A. Summary of Arguments

The Petition of Wasco Products, Inc. ("Wasco"), for a Writ of Certiorari ("Petition") should be denied for the following reasons:

1. The Ninth Circuit's opinion is confined to a narrow issue that is well-supported by applicable law and does not conflict with decisions of the Supreme Court, the Ninth Circuit, or other Courts of Appeal. Under California substantive law, which is applicable in this diversity action, a plaintiff who asserts conspiracy to toll the statute of limitations must have established the underlying legal theory of conspiracy as an affirmative claim. The tolling doctrine is dependent on the existence of the affirmative claim. The decision does not conflict with any of the cases cited by Wasco, holding that a plaintiff is not required to anticipate an affirmative defense, because in none of those cases did the plaintiff's rebuttal to the affirmative defense in question depend on having established an underlying legal theory through an affirmative claim.

2. Even if Wasco's analysis were to be accepted as an accurate reflection of the Ninth Circuit's decision and existing law, there is a complete absence of conflict among the Circuits. According to Wasco's theory, this case presents an aberrational decision within the Ninth Circuit.

3. The District Court determined that even if plaintiff had adequately alleged conspiracy, the claim would have been dismissed because there was no evidence supporting Plaintiff's assertion of conspiracy. Even if this Court were to reverse the Ninth Circuit's decision, the Ninth Circuit likely would affirm the District Court's

finding that there is no evidence supporting conspiracy. In that event, this Court's decision would have no practical effect on these litigants.

B. Summary of the Facts

Respondent Bostik, Inc. ("Bostik") manufactures sealants for use as component parts in insulating glass units ("IGUs"). The purpose of Bostik's sealants is to seal the IGUs and bind together its component parts.

Petitioner Wasco manufactures skylights and patio doors which, for a time, incorporated Bostik's sealants. Wasco contends that, in 1995, it began experiencing failures in the IGUs used in its skylights at three times the rate it deemed acceptable.

Wasco commenced this action by filing its complaint on June 18, 2002 – seven years after it began experiencing the allegedly higher than acceptable failure rates. Wasco filed a First Amended Complaint ("FAC") on July 10, 2002. Wasco's FAC contained ten claims for relief against Bostik, including two claims for alleged violations of California's Unfair Competition Laws ("UCL") – the only claims addressed in the Petition. Wasco also purported to state similar claims against respondent Southwall Technologies, Inc. ("Southwall"), the manufacturer of the IGUs. On Bostik's motion to dismiss, the District Court dismissed, with leave to amend, seven claims against Bostik because each failed to state claims against Bostik or were fatally uncertain.

Wasco then filed a Second Amended Complaint ("SAC"), which Bostik also moved to dismiss. The District Court dismissed several of Wasco's claims without leave to

amend. Based on Wasco's representation that it had additional facts that would cure the deficiencies, the District Court gave Wasco leave to amend its other claims.

When Wasco filed its Third Amended Complaint ("TAC"), Bostik again moved to dismiss certain of Wasco's claims. The District Court granted Bostik's motion with prejudice, observing that Wasco's conduct "has exhausted this Court's patience":

> Wasco's consistent practice of failing to include sufficient allegations in its complaint, and then providing the Court with argumentation and evidence outside the scope of Wasco's pleadings in an attempt to defeat motions to dismiss with prejudice, has exhausted this Court's patience.

As a result of the District Court's rulings on Bostik's motions to dismiss, only four claims remained against Bostik: (1) one claim for breach of express warranty; (2) one claim for strict product liability; and (3) two claims for alleged violations of the UCL.

On November 4, 2003, Bostik filed a Motion for Summary Judgment or, in the alternative, for Partial Summary Judgment of Claims and Issues ("Motion for Summary Judgment"), and sought dismissal of each of the four remaining claims against it. With regard to the UCL claims – the only claims relevant to this Petition – Bostik asserted that they should be dismissed because, among other reasons, those claims were untimely.

In its opposition to the Motion for Summary Judgment, Wasco argued that the UCL claims should not be dismissed as untimely because the claims were tolled by the doctrine of the "last overt act" – applicable exclusively in the context of conspiracies. Although Wasco had had

four opportunities to amend its complaint and cure its deficiencies, Wasco had not previously alleged the elements of conspiracy. Wasco's charge of conspiracy against Bostik and Southwall was raised for the first time in Wasco's opposition to the Motion for Summary Judgment.

On December 23, 2003, the District Court entered an order granting summary judgment in favor of Bostik. With regard to Wasco's UCL claims, the District Court rejected Wasco's assertion that the claim was tolled by the purported conspiracy between Bostik and Southwall because Wasco has presented insufficient evidence of any such conspiracy:

> The Court has reviewed ***the evidence*** submitted by Wasco in support of its [conspiracy] allegation. . . . None of this evidence even suggests an agreement between Bostik and Southwall to participate in a wrongful act, namely to deliberately misrepresent the durability of the sealants at issue. Similarly, ***this evidence*** fails to suggest that Bostik and Southwall committed any wrongful acts in furtherance of the alleged conspiracy. . . . ***The Court cannot infer that Bostik conspired with Southwall because there are no facts from which such an inference reasonably could be drawn.***

(Emphasis added; App. to Petition at 35.) Wasco appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit upheld the District Court's dismissal of Wasco's UCL claims. The Ninth Circuit determined that Wasco had not alleged the basic elements of conspiracy in its complaint and instead had attempted to

allege conspiracy for the first time in opposition to the Motion for Summary Judgment:

> In its opposition to summary judgment, Wasco alleged for the first time that Bostik and Southwall were engaged in a civil conspiracy to misrepresent the quality of the Heat Mirror IGUs in an attempt to toll the statute of limitations. No allegation of conspiracy or agreement between the companies appears in Wasco's complaint.

(App. to Petition at 3.)

After reviewing and analyzing the laws of all other circuits, the Ninth Circuit concluded that, because Wasco had not alleged the basic elements of conspiracy, Wasco could not avail itself of the tolling provisions of the last overt act doctrine:

> [A] plaintiff must plead, at a minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent. [Citations Omitted]. This requirement applies even if the civil conspiracy allegations are asserted only to toll the statute of limitations and even if they are raised only in opposition to summary judgment.

(App. to Petition at 6.)

Wasco then filed this Petition, arguing that the Ninth Circuit's ruling was inconsistent with other Circuits. For the reasons provided below, Wasco's contentions are without merit, and Bostik respectfully requests that the Court deny Wasco's Petition.

II. REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Decision, Which Wasco Has Mischaracterized, Does Not Conflict With Other Decisions and Is Well-Supported By Applicable Law

Wasco repeatedly mischaracterizes the Ninth Circuit's decision as holding that a plaintiff must plead facts or theories "in anticipation of an affirmative defense" even "where the defense does not appear on the face of the complaint." Having set up this straw man, Wasco seeks review on grounds that the Ninth Circuit's decision conflicts with this Court's decision in *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920 (1980), the Ninth Circuit's own decision in *U.S. v. McGee*, 993 F.2d 184 (9th Cir. 1993), and certain Seventh Circuit decisions. However, Wasco begins from an erroneous premise. The Ninth Circuit addressed a different issue: the narrow question of whether Wasco was required to plead a civil conspiracy in order to raise the conspiracy to toll the statute of limitations in opposition to a summary judgment motion. (App. to Petition at 2.) The Ninth Circuit held that a plaintiff is required to plead the basic elements of a civil conspiracy "even if the civil conspiracy allegations are asserted only to toll the statute of limitations and even if they are raised only in opposition to summary judgment." (App. to Petition at 6.)

Essentially, Wasco's premise is that because it asserted conspiracy only as a rebuttal to an affirmative defense, it was not required to anticipate that defense by pleading conspiracy. Wasco overlooks a critical distinction between conspiracy and the types of rebuttals to affirmative defenses to which it attempts to liken conspiracy. By its very nature, conspiracy operates as a tolling doctrine

only if it is first asserted as part of an underlying claim imposing liability, as discussed in subsection 1 below. If conspiracy is not part of the legal theory of the underlying claim, it cannot be used to toll the statute of limitations. As discussed in subsection 2 below, none of the cases cited by Wasco in its Petition involved a rebuttal to an affirmative defense that is dependent on having established an underlying legal theory through an affirmative claim.

The Ninth Circuit apparently recognized this essential distinction between the question presented to it and the cases cited by Wasco in its Petition, and appropriately observed that the issue appeared to be one of first impression for the court. (App. to Petition at 4.) The Ninth Circuit's decision is well-supported by applicable law, as shown below. Bostik has not found a conflicting decision by this Court or any federal Court of Appeals on the narrow issue addressed by the Ninth Circuit.

1. The Decision Is Well-Supported By Applicable Law

Because this is a diversity action, California substantive law is applicable with respect to both Wasco's underlying claims as well as rules tolling statutes of limitations. 28 U.S.C. § 1332. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51, 100 S.Ct. 1978 (1980).

Under California law, a claim for civil conspiracy, while not an independent cause of action, is a legal theory that gives rise to liability for an agreement to perform a wrongful act that results in damages. The elements of civil conspiracy are the wrongful act, "formation and operation of the conspiracy," and "damage resulting to plaintiff from an act or acts done in furtherance of the common design."

Doctors' Co. v. Superior Court, 49 Cal.3d 39, 44, 260 Cal.Rptr. 183 (1989). The significance of the conspiracy "lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." *Id. Accord Wyatt v. Union Mortgage Company*, 24 Cal.3d 773, 784, 157 Cal.Rptr. 392 (1979).

California law also recognizes a tolling doctrine for claims that include civil conspiracy: the statute of limitations does not begin to run for a plaintiff who has properly alleged and proved a conspiracy until the "'last overt act' pursuant to the conspiracy has been completed." *Wyatt v. Union Mortgage Company*, 24 Cal. at 53.[1] A "last overt act" cannot occur in a vacuum to toll a statute of limitations. There must first be a conspiracy pursuant to which the last overt act was committed. Only a statute of limitations on a claim that includes conspiracy as part of the underlying legal theory can be tolled until the last overt act of the conspirators. A claim for wrongful acts conducted by defendants acting individually rather than as conspirators would necessarily accrue without the benefit of the last overt act doctrine.

Ignoring these principles, Wasco, in opposing summary judgment, sought to toll the statute of limitations on its UCL claims based on the purported last overt act of Bostik and Southwall acting as conspirators, without having alleged any underlying legal theory – *i.e.* an affirmative claim for

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[1] This doctrine is also recognized under certain federal statutes. *See, e.g., Varner v. Peterson Farms*, 371 F.3d 1011, 1019-20 (8th Cir. 2004).

conspiracy. The Ninth Circuit appropriately held, "under federal law a plaintiff must plead, at minimum, the basic elements of a civil conspiracy" before it can be asserted to toll the statute of limitations (App. to Petition at 6), explaining:

> Wasco has failed to allege that Southwall and Bostik ever formed an agreement to misrepresent the properties of the sealant. Without any allegation that Bostik and Southwall agreed to commit wrongful acts, Wasco has failed under federal law to allege the most basic and fundamental element of a civil conspiracy.
>
> Wasco therefore may not toll the statute of limitations based on its allegations of civil conspiracy, which appear for the first time in its response to the summary judgment motion. '[T]he necessary factual averments are required with respect to each material element **of the underlying legal theory**.... Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.' *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990).

App. to Petition at 7-8 (emphasis added).[2]

This ruling is completely consistent with substantive California law relating to conspiracy and the "last overt act" doctrine and with federal pleading requirements for conspiracy claims. The Ninth Circuit recognized that

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[2] Other Circuits are in accord. *See, e.g., Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304-05 (7th Cir. 1993) (negligence claims developed as a result of discovery but not alleged in complaint could not save plaintiff from summary judgment dismissal of claims alleged in complaint).

federal courts have required plaintiffs asserting civil conspiracy "to plead at least the basic elements of conspiracy, especially the existence of an agreement." (Petition at 4.) Wasco does not dispute this; it is consistent with the prior rulings of the Ninth Circuit, and every other court that has considered the issue.[3]

2. The Ninth Circuit's Opinion Does Not Conflict With *Gomez v. Toledo*, *U.S. v. McGee* or the Decisions of Other Courts of Appeals

The Ninth Circuit's narrow holding that a plaintiff must allege civil conspiracy even if asserted only to toll the statute of limitations is not contrary to this Court's ruling

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[3] *See, e.g.*, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990) (plaintiff must, at the very least, allege specifically an agreement to conspire); *Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003) (to allege conspiracy, a plaintiff must at, a minimum, allege "the [identity of the] parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with"); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1152 (9th Cir. 1998) (affirming dismissal of conspiracy claim on the ground that plaintiffs "failed to allege facts to support their [conspiracy] allegations"); *Duncan v. Stuetzle*, 76 F.3d 1480 (9th Cir. 1996) (under California law, a complaint must allege formation and operation of conspiracy, wrongful act or acts done pursuant thereto, and damage resulting); *Montgomery v. City of Ardmore*, 365 F.3d 926, 939-40 (10th Cir. 2004) (no claim for conspiracy because plaintiff failed to "allege specific facts showing an agreement and concerted action amongst the defendants"); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) ("bare legal conclusion" of conspiracy "unsupported by specific allegations of any agreement or overt act" was insufficient to assert conspiracy); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154 (D.C. Cir. 2002) (to establish jurisdiction under a theory of civil conspiracy, the plaintiff must plead with particularity "overt acts within the forum taken in furtherance of the conspiracy").

in *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920 (1980), the Ninth Circuit's ruling in *U.S. v. McGee*, 993 F.2d 184 (9th Cir. 1993), or any of the other cases cited by Wasco. In contrast to this case, none of the cases cited by Wasco addressed a rebuttal to an affirmative defense that depended for its very existence on the underlying legal theory of the plaintiff's affirmative claim.

In *Gomez v. Toledo*, this Court held that a plaintiff in an action under 42 U.S.C. § 1983 need not allege a defendant's bad faith in anticipation of a qualified immunity defense in order to state a claim for relief. The Court reasoned:

> Nothing in the language or legislative history of § 1983 . . . suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief.

446 U.S. at 640.

In the context of a § 1983 claim, the only reason for alleging bad faith would be to rebut the official's defense that his good faith entitled him to immunity. That is not the issue addressed by the Ninth Circuit. As discussed above, the affirmative claim of conspiracy is necessary to trigger the "last overt act" doctrine as a rebuttal to the statute of limitations defense. Without the affirmative claim, the rebuttal cannot exist. Bad faith, in contrast, requires no allegation of an underlying legal theory.

In *McGee*, a taxpayer had entered an agreement with the government to waive the statute of limitations pending the resolution of an offer to compromise. When the government filed suit, the taxpayer moved to dismiss on

statute of limitations grounds, asserting that the government failed to allege that he had waived the limitations period. In affirming the District Court's order granting leave to amend, the Ninth Circuit noted that the government was "not required to plead on the subject of an anticipated affirmative defense." 993 F.2d at 187. Again, the only reason for alleging the waiver would have been in anticipation of the statute of limitations defense. No allegation of an underlying legal theory was necessary.

Wasco also cites several cases, all decided by the Seventh Circuit, holding that a plaintiff need not anticipate an affirmative defense in his complaint if the defense does not appear on the face of the complaint. (Petition at 8-10.) None of these cases addressed a rebuttal to an affirmative defense that is dependent on the pleading of an affirmative claim to establish and underlying legal theory, as is the case when conspiracy is asserted as a tolling doctrine.

Wasco does not cite any case, in any jurisdiction, that, in any way, is in conflict with the narrow holding of the Ninth Circuit in this case. The Ninth Circuit appears to be the first court to combine several well-established legal principles to conclude that a plaintiff must plead the basic elements of a civil conspiracy "even if the civil conspiracy allegations are asserted only to toll the statute of limitations and even if they are raised only in opposition to summary judgment." Whether this unusual issue will even be raised in other Circuits, and whether other Circuit Courts will adopt or reject the Ninth Circuit's extension of these well-established legal principles to this limited situation remains to be seen. At least until then, the issue does not merit consideration by the Supreme Court of the United States.

B. Even According to Wasco's Analysis, There Is No Conflict Among the Circuits But an Aberrational Decision Within the Ninth Circuit

Wasco does not assert that the Ninth Circuit, as a general matter, has taken a different view from other Circuits regarding the pleading standards at issue here. Rather, Wasco argues that the Ninth Circuit decision in this case was in conflict with other decisions of the Ninth Circuit, as well as the decisions of other Circuit Courts of Appeal and of this Court:

> Petitioner seeks review of the Ninth Circuit's ruling because it is in conflict with the rulings of this Court, including *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920 (1980). It is also in conflict with the rulings of the Ninth Circuit. *See U.S. v. McGee*, 993 F.2d 184 (9th Cir. 1993). It is also in conflict with the rulings of several other circuits. *See also Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993).

(Petition at 2.)

By Wasco's own admission, there is no conflict among the Circuits. Even if Wasco's analysis is accepted as completely accurate, Wasco has shown only that the Ninth Circuit decision deviates from its own prior rulings – a single aberrant case within its own Circuit. According to Wasco, all other well-established law on the issue, including that discussed in leading treatises, is contrary to this decision:

> Not only do other circuits clearly reject the Ninth Circuit's new approach, but so does the leading commentator on federal pleading.

(Petition at 10, referring to C. Wright & A. Miller, *Federal Practice and Procedure*.)

A single aberrational decision within a Circuit taking a "new approach," does not warrant review by this Court.

C. The District Court Already Ruled That There Is No Evidence Supporting A Charge of Conspiracy

Even if the Supreme Court were to accept review and reverse the opinion of the Ninth Circuit regarding the pleading requirement for a charge of conspiracy, the ultimate outcome of this case would likely remain the same.

While the Ninth Circuit upheld the District Court's opinion on the ground that Wasco's pleadings were deficient, the District Court went further. The District Court considered Wasco's arguments in support of its purported conspiracy allegations, and concluded that "there are no facts from which [] an inference [of conspiracy] reasonably could be drawn." (App. to Petition at 35.) In other words, the District Court already ruled that, even if Wasco had adequately pled conspiracy, its claim against Bostik would be dismissed because Wasco lacked sufficient evidence to support its purported conspiracy allegations.

If this Court reversed the Ninth Circuit's decision, the Ninth Circuit would still have an opportunity to consider Wasco's evidence of conspiracy and determine whether the District Court was correct that no facts exist to support the inference of a conspiracy. If the Ninth Circuit were to agree with the District Court, a reversal of its decision by

this Court would have no practical effect on the litigants in this case.

III. CONCLUSION

This is not a case that should be reviewed by the United States Supreme Court. The Ninth Circuit's decision on a narrow issue of law is well supported by applicable California substantive law and federal procedural law. As shown, it does not conflict with any decisions by this Court or any federal Court of Appeals.

Even if this Court agrees with Wasco's legal analysis, there is no conflict among the Circuits. According to Wasco's theory, this case presents an aberrational decision within the Ninth Circuit.

Finally, even if this Court were to reverse the Ninth Circuit, the outcome of this case likely will be no different because the Ninth Circuit would likely affirm the District Court's finding that Wasco lacked any evidence to support an allegation of conspiracy.

For all of these reasons, Bostik respectfully requests that the Court deny Wasco's Petition for a Writ of Certiorari.

Respectfully submitted,

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